Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MEMPHIS HOUSING AUTHORITY,

Petitioner,

v.

TARA THOMPSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues presented in this case have been addressed in a number of state courts and once in a federal appeals court with conflicting results. The major issues of this case are as follows:

1. Whether a public housing authority is authorized by the Affordable Housing Act, 42 U.S.C. § 1437d(1)(6), and the Regulations promulgated by HUD under that Act, to evict a tenant solely for the drug related criminal activities committed in the tenant's unit by an invited guest regardless of the tenant's lack of knowledge of the activity?

2. Whether, under the United States Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Tennessee Supreme Court should have deferred to HUD's explicit finding that under the Affordable Housing Act, 42 U.S.C. § 1437d(1)(6), a "tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit?"

3. Whether the Tennessee Supreme Court should nullify a Federal Legislative Act or Regulations based upon hypothetical applications of statutory language?

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The Memphis Housing Authority hereby petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Supreme Court of Tennessee entered in this case on February 20, 2001.

OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Tennessee of which the petitioner seeks review is reproduced at **App. 1a** and is reported at 38 S.W.3d 504 (Tenn. 2001). The Supreme Court on March 15, 2001 entered an order denying a timely petition for rehearing and correcting the opinion entered on February 20, 2001. The order is reproduced at **App. 100a**. The opinion of the Tennessee Court of Appeals is reproduced at **App. 44a**. The order of the trial court, the Circuit Court of Shelby County, granting summary judgment is reproduced at **App. 80a** and the order of the trial court, the Circuit Court of Shelby County, denying motion for summary judgment is reproduced at **App. 83a**.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the Supreme Court of Tennessee, which was entered on February 20, 2001. **App. 1a**. Petitioner filed a timely Petition for Rehearing seeking a discretionary rehearing by the Tennessee Supreme Court. That Petition for Rehearing was denied by Order entered on March 15, 2001 at **App. 100a**.

The Tennessee Supreme Court has decided an important question of federal law in a manner that conflicts with the decision of another state court of last resort, other state appellate courts and a United States Court of Appeals decision.

The decision of the Tennessee Supreme Court was based solely on its erroneous interpretation of a federal statute, 42 U.S.C. § 1437d(1)(6), and the regulations promulgated thereunder. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Statutory Provision Involved

Each public housing authority shall utilize leases which

> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(6) (Supp. 2000).

B. Regulatory Provision Involved

To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

> (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(I).

STATEMENT OF THE CASE

On October 17, 1997, the appellant, Tara Thompson, executed a lease and began residing in an apartment in the Fowler Homes Housing Development ("Fowler Homes"). Fowler Homes is owned and operated by Memphis Housing Authority ("MHA"), a federally funded public housing authority within the meaning of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 *et seq.* ("Federal Housing Act"). A federal statute requires that public housing authorities, such as MHA, use leases that:

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control shall be cause for termination of tenancy.

42 U.S.C. § 1437d(l)(6) (Supp. 2000). In order to comply with this federal statute, MHA included provisions in its lease agreements that require a resident:

> [t]o refrain from and cause household members, guests, or persons under the resident's control from engaging in any criminal activity or unlawful activity that threatens the health, safety or right to a peaceful enjoyment of the Memphis Housing Authority's public housing premises by other residents or employees of the Memphis Housing Authority which includes but is not limited to any drug-related criminal activity on or off the premises.

The lease further provides that cause for termination exist if "the resident, any members of the household, a guest or other person under the resident's control" engage in "any drug-related criminal activity on or off the premises." The lease agreement Thompson signed contained these provisions.

Thompson was pregnant with her third child when she moved into her Fowler Homes apartment in October of 1997. Tallen Williams, the father of Thompson's unborn child, was incarcerated in the Shelby County Jail in December of 1997. Thompson visited Williams at the jail on three occasions. During these jail visits, Williams told Thompson that he had been jailed for violating his probation by failing to perform community service. Williams did not tell Thompson why he initially had been placed on probation, and Thompson did not inquire further into Williams' criminal record.

Thompson and Williams' child was born on January 13, 1998. Less than one month later, on February 6, 1998, Thompson saw Williams "hanging out with his friends" at Fowler Homes. Thompson asked Williams to come to her apartment and care for her three children, including his three-week-old baby, while she did laundry. Williams agreed. While Williams was babysitting in Thompson's apartment, officers of the Memphis Police Department executed a search warrant, raided the apartment, found 0.4 grams of cocaine in the apartment[1] and arrested Williams. Williams told the police that the drugs found in the apartment belonged to him; Thompson was not questioned or detained in connection with Williams' arrest. The Police also found several handguns in the apartment. Williams denied any knowledge of the weapons.

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1. Several pieces of crack cocaine were laying on the kitchen table and one piece of what appeared to be crack cocaine was found inside the kitchen cabinet.

On February 13, 1998, MHA provided Thompson a written "Three Day Notice of Termination of Lease" which advised that her lease was being terminated based upon her violation of Section 7, paragraphs L through N of her lease prohibiting drug-related criminal activity on the premises. When Thompson refused to vacate the premises, MHA brought an unlawful detainer action.

This action was tried initially in the General Sessions Court of Shelby County upon stipulations of facts. The General Session Court granted MHA judgment for possession. Thompson appealed the judgment to the Circuit Court of Shelby County, and MHA moved for summary judgment contending, based upon the undisputed facts, that it was entitled to terminate Thompson's lease because she had violated the lease provisions prohibiting drug-related criminal activity on the premises. Thompson argued that termination of her lease was not appropriate because she had no knowledge of Williams' illegal drug activity until after his arrest. The trial court initially denied MHA's motion for summary judgment stating:

> while the contract places a heavy burden upon a tenant to take an active role in preventing the use of the premises by guests of the tenant who are engaged in illegal or drug-related activity, an entirely innocent tenant, whose ignorance of the activity is not due to indifference or lack of precautions on his or her part, should not be a basis for eviction.

App. at 97a. In denying the motion for summary judgment, the trial court emphasized that it had considered only the written stipulation of facts and had not considered Thompson's deposition, which also was in the file.

MHA filed a motion asking the trial court to reconsider its denial of summary judgment. As grounds for the motion, MHA argued that the trial court had erred by refusing to consider Thompson's deposition. The trial court agreed and granted MHA's motion for reconsideration. Upon considering Thompson's deposition, the written stipulation of facts and "the entire record," the trial court granted the motion for summary judgment and issued a writ of possession in favor of MHA.

Thompson appealed the trial court's decision to the Court of Appeals, arguing that the trial court erred by granting summary judgment to MHA because she had no prior knowledge of Williams' illegal drug activity, and further, she had no ability to control Williams' conduct. The Court of Appeals rejected Thompson's argument and affirmed summary judgment in favor of MHA. In so holding, the Court of Appeals stated:

> [T]he lease provisions placed upon Thompson the affirmative obligation to ensure that her guests did not engage in drug-related criminal activity while in her apartment. In light of the affirmative nature of this obligation, Thompson's actual or constructive knowledge of Williams' drug-related criminal activity was irrelevant. Regardless of her knowledge of Williams's drug activity, under the terms of her lease, Thompson became responsible for such activity once she granted Williams access to her apartment. Even when viewed in the light most favorable to Thompson, the evidence presented below demonstrated that Thompson violated her lease with MHA when she granted Williams access to her apartment and subsequently

> failed to cause Williams to refrain from possessing illegal drugs while in the apartment. Under these circumstances, MHA had the right to enforce the lease provisions evicting Thompson.

App. at 66a. Thompson filed an application for permission to appeal the decision of the Tennessee Court of Appeals to the Tennessee Supreme Court.

The Tennessee Supreme Court granted Thompson's application for permission to appeal to determine whether the federally mandated lease provisions allow a public housing authority to evict a tenant based upon the drug-related criminal activities of a "guest or other person under the tenant's control" regardless of whether the tenant had knowledge of the illegal activity. The Tennessee Supreme Court reversed the judgment of the Court of Appeals and held that:

> the lease agreement imposes strict liability for drug-related criminal activity engaged in by the tenant or any household member *but* permits eviction for the drug related criminal activity of "guests and other persons under [the tenant's] control" only if the tenant knew or should have known of the drug-related criminal activity and failed to take reasonable steps to halt or prevent the illegal activity.

App. at 3a. The Court also remanded the case to the trial court for reconsideration of MHA's motion for summary judgment under the above quoted legal standard.

REASONS FOR GRANTING THE WRIT

A number of state appellate courts and one federal Court of Appeals have addressed the issue of whether the relevant federal law permits a public housing authority to evict a tenant based upon the drug-related criminal activities of a "guest or other person under the tenant's control" regardless of whether the tenant had knowledge of the illegal activity. To date, there is a direct, irreconcilable conflict between those courts. The implementation and interpretation of a federal law should be the same in every state of this Country. The effects of crime and drugs on the lives of public housing residents in this Nation knows no geographic boundaries. It is incumbent upon this Court to set the standard for Public Housing Authorities and residents regarding evictions based upon the drug-related criminal activity of resident's guest.

In this case, the Tennessee Supreme Court ruled that Petitioner could not evict a tenant based solely on the drug-related criminal conduct of tenant's guest in the tenant's apartment unless the tenant had knowledge. In so doing, the Tennessee Supreme Court ignored the clear language of the statute and substituted its judgment as to the meaning of a federal statute for that of the Department of Housing and Urban Development ("HUD"), the agency charged with enforcing the statute. The Tennessee Supreme Court also put itself in conflict with the vast number of state appellate courts, which have considered the issue.

Because of this confiict, and because the federal statute at issue is a critical part of the fabric of laws and regulations woven by Congress and HUD to address the overwhelming problem of crime and drugs in public housing developments

across America, this Court should issue a writ of certiorari. This Court should then find, consistent with the explicit finding of HUD and the plain terms of the statute as enacted by Congress, that a resident should not be excused from contractual responsibility by arguing that the resident did not know, could not foresee, or could not control the behavior of an invited guest in the unit.

A. There is a Conflict Between the Various State Courts and the Single Federal Court of Appeals Which Have Considered the Important Federal Issue Raised in This Case.

1. The Legislation and Regulations At Issue in this Case Are a Critical Part of the War Against Crime and Drugs in Public Housing Development in this country

In 1988, faced with a devastating and worsening epidemic of drug related crime and violence in public housing, Congress took decisive steps toward improving living conditions in public housing. Beginning with the observations that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime," 42 U.S.C. § 11901(1)-(2), Congress created an effective and efficient mechanism for ridding public housing of drug-related criminal activity or other crimes.

Using unmistakably clear statutory language, based on reasonable findings that such legislation was necessary[2], Congress provided that drug-related criminal activity by a public housing tenant, a member of the tenant's household, or a guest would be a sufficient ground for eviction. Specifically, Congress required all local housing authorities to use leases which:

> (5) Provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(5) (1989).

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2. Congress made three other related findings:

> (3) Drug dealers are increasingly imposing a reign of terror on public and other federally assisted low income housing tenants;
>
> (4) The increase in drug related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures;
>
> (5) Local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low income housing, particularly in light of the recent reductions in Federal aid to cities. . . .

Id. § 11901(3)-(5).

Two years later, as part of the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625 § 504, 104 Stat. 4079, 4185 (1990), Congress clarified the statutory requirement, mandating that all leases:

> (5) Provide that any criminal activity that threatens safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(5) (1991).[3]

In response to Congress' mandate, HUD promulgated regulations that implemented this statutory prohibition against criminal activity. Housing and Urban Development: Lease Requirements, 24 C.F.R. § 966.4(1)(2)(ii) (1993), 56 Fed. Reg. 51560, 51578 (1991).

In formulating these regulations, HUD considered comments by legal aid attorneys and by tenant organizations that tenants "should not be required to 'assure' the non-criminal conduct of household members or guest, or should have only a limited responsibility to prevent criminal behavior by members of the household or guest" and

> that the tenant should not be responsible if the criminal activity is beyond the tenant's control,

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3. In 1996 Congress replaced the phrase "on or near such premises" with "on or off such premises. " *Id.* (1997). In 1998, the section was redesignated as subsection (1)(6). *Id.* (1999).

> if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant did everything "reasonable" to control the criminal activity.

56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). Ultimately, HUD decided not to accept these suggestions. Instead, following the statute as enacted, which contained no such caveat, HUD stated quite explicitly:

> The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Id. at 51567.

Like the controlling statute, the implementing regulations by HUD require local housing authorities to secure leases from each of their tenants in which the tenant explicitly promises:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(I).

2. Courts Interpreting the Statute and the Regulations Have Reached Conflicting Results.

In this case, the Supreme Court of Tennessee held that:

> Neither federal law nor the lease provision imposes a standard of strict liability for the drug-related criminal activities of Thompson's guest or other persons under her control. The phrase "under the resident's" control permits eviction only if MHA establishes that Thompson knew or should have known of the drug-related criminal activity "of a guest or other person" and failed to take reasonable steps to prevent or halt it.

App. at 41a. The only federal court of appeals to consider the issue agreed with the Tennessee Court as to guest or other persons. "Congress did not intend § 1437d(l)(6) to permit the eviction of innocent tenants." *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*). However, the Courts differ as to their treatment of "household members". The Tennessee Supreme Court found that the federal statute clearly imposes strict liability upon the "household members" for engaging in drug-related criminal activity. On the other hand, the Ninth Circuit Federal Court of Appeal in *Rucker* adopted a position that allows eviction only if the resident knew or should have known of the drug-related criminal activity of the "household member" and failed to prevent or halt it.

The only other state supreme court to address the issue also disagreed with the *Rucker* decision, holding that, in light of the terms of the federal statute, HUD's regulations, and the federally-mandated terms of the tenant's lease, a tenant could be evicted because of her son's conviction in a drive-

by shooting of a neighboring residence even though she "did not have any knowledge of her son's criminal activities or reason to anticipate her son's acts." *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700, 702-03 (Minn. 1999).

The various other state appellate courts which have considered the issue have split. Several have agreed with the holding of the Supreme Court of Minnesota that the statute and the regulations permit the eviction of a tenant based solely on the criminal activities of family members or guests. *See Ann Arbor Housing Commission v. Wells*, 240 Mich. App. 610, 616-18, 618 N.W.2d 43 (Mich. Ct. App. 2000) ("The express statutory language evinces a clear congressional intent to authorize termination of a tenancy regardless of whether the tenant was aware that his household member or guest was selling, manufacturing, distributing, or using drugs."); *Barajas v. Housing Authority of Harlingen*, 882 S.W.2d 853 (Tex. App. Corpus Christi 1994) (affirming award of summary judgment to PHA based on the plain terms of the federally-mandated lease language); *Syracuse Hous. Auth. v. Boule*, 172 Misc. 2d 254, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), *aff'd*, 177 Misc. 2d 400, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998), *rev'd*, 265 A.D.2d 832, 701 N.Y.S.2d 541 (N.Y. App. Div. 4th Dep't 1999) (finding that eviction without proof of knowledge of criminal activity was consistent with statute, HUD regulation and HUD "One Strike and You're Out" policy) (citing the Tennessee Court of Appeals decision in the case at bar); *Housing Authority of New Orleans v. Green*, 657 So. 2d 552 (La. App. 4th Cir. 1995), *app. denied*, 661 So. 2d 1355 (La. 1995), *cert. denied*, 517 U.S. 1169 (1996) (language of statute does not imply that tenant must have knowledge about drug activity as precondition to eviction; *South San Francisco*

Housing Authority v. Guillory, 41 Cal. App. 4th Supp. 13, 19, 49 Cal. Rptr. 2d 367, 371 (1995) (by requiring that each public housing lease contain language setting forth that drug-related activity by any member of a tenant's household is cause for eviction, Congress provided "straightforward practical method" for eviction based on strict liability). A number of state appellate courts, however, have reached the same conclusion the Tennessee Supreme Court reached in this case. *Charlotte Housing Auth. v. Patterson*, 464 S.E.2d 68 (N.C. App. 1995) (turning on lack or personal fault, control and foresee ability).

The basis for the conflict is well illustrated by the majority and dissenting opinions in *Rucker*, decided *en banc* on January 23, 2001. In *Rucker*, four public housing tenants filed suit in federal court under the Administrative Procedures Act, 5 U.S.C. §§ 701-706, seeking to enjoin eviction actions which were pending against them in state court. Each eviction action was based on the criminal activities of others of which the tenant had no knowledge.

The district court entered the requested injunction. On appeal, the original panel reversed. *Rucker v. Davis*, 203 F.3d 627 (9th Cir. 2000), *rehearing en banc granted* at 222 F.3d 614 (9th Cir. 2000).

After rehearing before the court *en banc*, the Ninth Circuit affirmed the district court. The majority found:

> [t]he statutory provision does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted. . . . When [Section 1437d(1)(6) is] read in conjunction with the

> remainder of §1437d(1) and other provisions enacted at the same time, however, it appears that Congress did not intend subsection (6) to apply to eviction of innocent tenants.

Rucker v. Davis, 237 F.3d 1120, 1123 (9th Cir. 2001) (*en banc*).[4] Purporting to find further support for that conclusion in the legislative history, the *Rucker* majority rejected HUD's interpretation of the statute on the ground that it was clearly contrary to Congress' intent. *Id.* at *14. The majority also found that permitting the eviction of innocent tenants would be "unreasonable" and "absurd." *Id.* at *1129.

On the other hand, the dissenters in *Rucker* agreed with a number of the state appellate courts which have considered the issue that "[b]ecause the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute." *Id.* at *1128. After analyzing the statute at length and concluding that it was not ambiguous, the dissenters concluded:

> It is obvious that when Congress authorized the eviction of innocent tenants, the potential for individual unfairness existed. Congress granted to local PHA's the power to evict and trusted that the "humane judgment" of PHA officials and the procedural protections of the Act would prevent the abuse of this power. Congress struck a balance. It did so in the face of a drug crisis and the ineffectiveness of traditional law enforcement.

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4. A petition for writ of certiorari was filed by HUD on May 24, 2001 docket No. 00-1770: *HUD v. Rucker, et al.*

> It bestowed upon the PHAs the authority challenged in this case. That authority does not violate the Constitution. This legislation should be interpreted as it was written.

Id. at *1142.

Clearly, there is a conflict that this Court needs to resolve.[5]

B. The Lower Court Ignored Both the Language of the Statute and a Definitive Interpretation of Federal Law Rendered by the Federal Agency Charged With Enforcement of That Law.

Consistent with the relevant section of the United States Housing Act, Tara Thompson's lease stated that residents are obligated:

> [t]o refrain from and cause household members, guests, or persons under the resident's control from engaging in any criminal activity or unlawful activity that threatens the health, safety or right to a peaceful enjoyment of the Memphis Housing Authority's public housing premises by other residents or employees of the Memphis Housing Authority which includes but is not limited to any drug-related criminal activity on or off the premises.

App. at 6a. The Supreme Court found this language, and the relevant statutory language, unclear "with respect to the

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5. *See* HUD Notice PIH 2001-8 (HA) at **App. 106a**.

standard that applies to a guest or other person under the resident's control." The Court found the phrase "under the resident's control" in both the lease and statute to be vague as to guests and other persons. The Court concluded:

> The phrase, "under the resident's control," relates only to the last two categories — guests or other persons. Although other courts have applied a single standard to all four categories, we conclude that applying a single standard is not consistent with the plain language of either the lease provisions in this case or the federal statutes from which they are derived. While both the language of this lease, and the federal statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity, the language is not clear with respect to the standard that applies to a guest or other person under the resident's control.

App. at 37a. Accordingly, the Court felt compelled to look at the legislative history, where it found what it determined to be a clearly expressed legislative intent that the phrase under the resident's control permits eviction only if the Authority proves "that the resident knew or should have known of the drug-related criminal activity of a 'guest' or 'other person' and failed to take reasonable steps to prevent or halt it."

In so doing, the court ignored the clear language of the statute and the interpretation of the statute rendered by HUD, the agency charged with enforcing the statute. HUD has promulgated regulations, which make clear its view that the statute does permit the eviction of so-called "innocent" tenants, a view dictated by the terms of the statute as enacted.

In fact, in promulgating those regulations, HUD rejected comments, which suggested that was not the proper interpretation of the statute, stating that:

> The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

56 Fed. Reg. 51567.

HUD offered several reasons for its decision. First, the

> contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Id. at 51567. HUD also noted that PHA's might often have difficulty proving in court that the leaseholder had knowledge or control over the offending person, thus making it time-consuming, costly, and otherwise cumbersome to evict households causing drug-related problems in public housing. *Id.*

This Court has repeatedly held that where the agency charged with enforcing a statute has rendered its interpretation of that statute, and that interpretation is a "permissible construction of the statute," courts may not

substitute their own judgment for that of the agency. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Here, HUD has rendered such a "permissible construction of the statute" and the lower court erred in not deferring to that interpretation. As the dissenters noted in *Rucker* "because the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute."

Like the majority in *Rucker*, the Supreme Court of Tennessee here has substituted its own judgment for that of Congress and that of HUD. In so doing, it far exceeded its proper role, essentially nullifying an important part of the federal plan for combating crime and drugs in America.

C. The Lower Court Should Not Nullify A Standard Or Legislative Act Based upon Hypothetical Applications Of Statutory Language

The Court, in its opinion, found the standard of strict liability sensible when applied to the first two separate categories of people referred to in the lease and Act. The Court however found the standard to be "absurd" when applied to guest or other persons under the tenant's control, the third and fourth separate categories. It appears that the Court reached this finding based upon a hypothetical. The Court opined:

> Finally, while a standard of strict liability is sensible when it is applied to the resident or household members, such a standard yields absurd results when it is applied to guests or other persons. . . . We do not believe Congress intended such an absurd result.

App. at 102a. The Tennessee Supreme Court should not rewrite legislative enactments and ignore the expertise of the executive agency (HUD) based upon what the Court assumes may be absurd. It is the Court's obligation to read the statute as it is written although "acknowledging the reality that the breath of the statute may exceed the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403 (1998).

The Tennessee Supreme Court in determining the standard to be applied in drug-related criminal activity of a tenant's guest should not set the standard based upon envisioning the most extreme applications conceivable but deal with those cases if and when they arise. The Tennessee Supreme Court should limit its review to the controversy actually presented.

This Court has repeatedly rejected judicial review of hypothetical applications of statutory language, *FCC v. Pacifica*, 438 U.S. 726, 743 (1978).

CONCLUSION

For the foregoing reasons, Petitioner Memphis Housing Authority respectfully requests that this Court issue a writ of certiorari to the Tennessee Supreme Court.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. 00-

IN THE
Supreme Court of the United States

MEMPHIS HOUSING AUTHORITY,

Petitioner,

v.

TARA THOMPSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

APPENDIX

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APPENDIX

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Opinion of the Court of Appeals of Tennessee dated July 29, 1999 ..... 44a

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IN THE SUPREME COURT OF TENNESSEE AT JACKSON

November 16, 2000 Session Heard at Jackson[1]

MEMPHIS HOUSING AUTHORITY v. TARA THOMPSON

Appeal by permission from the Court of Appeals, Western Section

Circuit Court for Shelby County

No. 94425-T.D.-7 Robert A. Lanier, Judge

---

[1] Oral argument was heard in this case on November 16, 2000, in Jackson, Madison County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

No. W1998-00108-SC-R11-CV - Filed February 20, 2001

The appellee, Memphis Housing Authority brought this unlawful detainer action seeking to evict the appellant, tenant Tara Thompson, after drugs were discovered on the father of her child while he was inside her apartment. The trial court granted summary judgment to the appellee, and the Court of Appeals affirmed, finding that the lease agreement imposes strict liability upon the appellant for the drug-related criminal activity of her "guests and other persons under her control." We granted permission to appeal to consider the appropriate standard that applies when

a public housing authority seeks to evict a tenant for drug-related criminal activity. This is an issue of first impression in Tennessee. After due consideration, we hold that the lease agreement imposes strict liability for drug-related criminal activity engaged in by the tenant or any household member but permits eviction for the drug related criminal activity of "guests and other persons under [the tenant's] control"only if the tenant knew or should have known of the drug-related criminal activity and failed to take reasonable steps to halt or prevent the illegal activity. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for reconsideration of the appellee's motion for summary judgment under the legal standard announced herein.

Tenn. R. App. P. 11; Judgment of the Court of Appeals Reversed;
Case Remanded to Trial Court

FRANK F. DROWOTA, III, J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., ADOLPHO A. BIRCH, JR., JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined.

Webb M. Brewer, Debra N. Brittenum, Margaret Barr-Myers, Nancy Percer Kessler, and Brenda Oates-Williams, Memphis, Tennessee, for the appellant, Tara Thompson.

Gregory L. Perry, Memphis, Tennessee, for the appellee, Memphis Housing Authority.

Drake Holliday, Legal Aid Society of Middle Tennessee, Nashville, Tennessee and David Kozlowski, Legal Services of South Central Tennessee, Incorporated, for the Amicus Curiae, Tennessee Association of Legal Services.

OPINION

Background

On October 17, 1997, the appellant, Tara Thompson, executed a lease and began residing in an apartment in the Fowler Homes Housing Development ("Fowler Homes"). Fowler Homes is owned and operated by appellee Memphis Housing Authority ("MHA"), a federally funded public housing authority within the meaning of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 et seq. ("Federal Housing Act"). A federal statute requires that public housing authorities, such as MHA, use leases that

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public

> housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control shall be cause for termination of tenancy.

42 U.S.C. § 1437d(l)(6) (Supp. 2000). Attempting to comply with this federal statute, MHA included provisions in its lease agreements that require a tenant

> [t]o refrain from and cause household members, guests, or persons under the resident's control from engaging in any criminal activity or unlawful activity that threatens the health, safety or right to a peaceful enjoyment of the Memphis Housing Authority's public housing premises by other residents or employees of the Memphis Housing Authority which includes but is not

limited to any drug-related criminal activity on or off the premises.

The lease further provides that cause for termination exists if "the resident, any members of the household, a guest of other person under the resident's control" engages in "any drug-related criminal activity on or off the premises." The lease agreement Thompson signed contained these provisions.

Thompson was pregnant with her third child when she moved into her Fowler Homes apartment in October of 1997. The record reflects that Tallen Williams, the father of Thompson's unborn child, was incarcerated in the Shelby County jail in December of 1997 and that Thompson visited Williams on three occasions. During these visits, Williams told Thompson that he had been jailed for violating his probation by failing to perform community service. Williams did not tell Thompson why he initially had

been placed on probation, and Thompson did not inquire further into Williams' criminal record.

The record reflects that Thompson's and Williams' child was born on January 13, 1998. Less than one month later, on February 6, 1998, Thompson saw Williams "hanging out with his friends" at Fowler Homes. Thompson asked Williams to come to her apartment and care for her three children, including his three-week-old baby, while she did laundry. Williams agreed. While Williams was babysitting in Thompson's apartment, officers of the Memphis Police Department executed a search warrant, raided the apartment, found 0.4 grams of cocaine in Williams' possession, and arrested him. Williams told the police that the drugs belonged to him, and Thompson was not questioned or detained in connection with Williams' arrest.

One week later, however, on February 13, 1998, MHA provided Thompson a written "Three Day Notice of Termination of Lease" which advised that

her lease was being terminated based upon her violation of Section 7, paragraphs L through N of her lease prohibiting drug-related criminal activity on the premises. When Thompson refused to vacate the premises, MHA brought this unlawful detainer action.

This action initially was tried in General Sessions Court where a judgment for possession was entered in favor of MHA. Thompson appealed the judgment to the Circuit Court, and MHA moved for summary judgment contending, based upon the undisputed facts, that it was entitled to terminate Thompson's lease because she had violated the lease provisions prohibiting drug-related criminal activity on the premises. Thompson argued that termination of her lease was not appropriate because she had no knowledge of Williams' illegal drug activity until after his arrest.

The trial court initially denied MHA's motion for summary judgment, stating,

> while the contract places a heavy burden upon a tenant to take an active role in preventing the use of the premises by guests of the tenant who are engaged in illegal or drug-related activity, an entirely innocent tenant, whose ignorance of the activity is not due to indifference or lack of precautions on his or her part, should not be a basis for eviction.

In denying the motion for summary judgment, the trial court emphasized that it had considered only the written stipulation of facts and had not considered Thompson's deposition which also was in the file.

MHA filed a motion asking the trial court to reconsider its denial of summary judgment. As grounds for the motion, MHA argued that the trial court had erred by refusing to consider Thompson's deposition. The trial court agreed and granted MHA's

motion for reconsideration. Upon considering Thompson's deposition, the written stipulation of facts and "the entire record," the trial court granted the motion for summary judgment and issued a writ of possession in favor of MHA.

Thompson appealed the trial court's decision, and she argued before the Western Section Court of Appeals that the trial court erred by granting summary judgment to MHA because she had no prior knowledge of Williams' illegal drug activity, and further, she had no ability to control Williams' conduct. The Court of Appeals rejected Thompson's argument and affirmed summary judgment in favor of MHA. In so holding, the Court of Appeals stated:

> [T]he lease provisions placed upon Thompson the affirmative obligation to ensure that her guests did not engage in drug-related criminal activity while in her apartment. In light of the

affirmative nature of this obligation, Thompson's actual or constructive knowledge of Williams' drug-related criminal activity was irrelevant. Regardless of her knowledge of Williams drug activity, under the terms of her lease, Thompson became responsible for such activity once she granted Williams access to her apartment. Even when viewed in the light most favorable to Thompson, the evidence presented below demonstrated that Thompson violated her lease with MHA when she granted Williams access to her apartment and subsequently failed to cause Williams to refrain from possessing illegal drugs while in the apartment. Under these circumstances, MHA had the right to

enforce the lease provisions evicting Thompson.

We granted Thompson's application for permission to appeal to determine whether these federally mandated lease provisions allow a public housing authority to evict a tenant based upon the drug-related criminal activities of a "guest or other person under the tenant's control" regardless of whether the tenant had knowledge of the illegal activity. While the lease provisions impose strict liability for the drug-related criminal activity of the tenant or a household member, we conclude that eviction is appropriate based upon the drug-related criminal activity of a "guest or other person under the tenant's control," only if the tenant knew or should have known of the illegal drug-related activity and failed to take reasonable steps to prevent or halt it. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for

reconsideration of the motion for summary judgment under the legal standard announced herein.

Standard of Review

Summary judgment is appropriate where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. See Tenn. R. Civ. P. 56.04. We must take the strongest view of the evidence in favor of the non-movant, allow all reasonable inferences, and discard all countervailing evidence. See Byrd v. Hall, 847 S.W.2d 208, 210-11 (Tenn. 1993). Our review concerns a question of law only. Therefore, the trial court's judgment is not presumed correct, and our review is de novo on the record before this Court. See Miller v. Willbanks, 8 S.W.3d 607, 608-09 (Tenn. 1999); Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997).

Standard for Eviction: Strict Liability or Knowledge?

As stated, the issue in this appeal arises from a lease provision that is mandated by federal law;

therefore, we begin our analysis by considering the relevant federal law. The Federal Housing Act is intended to assist state and local governments in providing affordable housing to low income families. See Pub. L. No. 75-412, 50 Stat. 888 (1937); 42 U.S.C. § 1437(a); Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties, 76 Tex. L. Rev. 1495, 1498 (1998). Under the Act, responsibility for managing, maintaining, and operating public housing developments is vested in local public housing agencies, such as MHA, rather than the federal government. See 42 U.S.C. § 1437(a)(1)(c). To obtain federal funding, however, local public housing agencies must agree to abide by federal law and by federal regulations, promulgated by the Department of Housing and Urban Development ("HUD"). See generally 42 U.S.C. § 1437(g).

Concerned about the prevalence of crime in public housing developments, Congress passed the

Cranston-Gonzalez National Affordable Housing Act of 1990. See Pub. L. 101-625. This legislation required all public housing agencies to include in their leases the following provision:

> any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437(d)(l)(6). The scope of this statute was broadened further by a 1996 amendment which replaced the phrase "on or near such premises," with

the phrase "on or off such premises." See Pub. L. 104-20 § 9(a)(1); 42 U.S.C. § 1437(d)(l)(6).

To implement this statutory mandate, HUD promulgated regulations that require public housing authorities to include a provision in their leases

> [t]o assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i)(B). Another regulation similarly provides that any drug-related criminal activity on or off the premises "by the tenant, any member of the household, a guest, or another person

under the tenant's control, shall be cause for termination of tenancy." 24 C.F.R. § 966.4(l)(2)(ii)(B). Consistent with these regulations, in 1996 the Clinton administration announced a "One Strike and You're Out" policy which encouraged local public housing authorities to take full advantage of these federal statutes to promote community safety in public housing. See 76 Tex. L. Rev. at 1503.

Attempting to comply with these federal laws, MHA has included the following provisions in its leases:

> 7. OBLIGATIONS OF RESIDENT
>
> Resident Agrees:
>
> * * * *
>
> L. To conduct himself/herself and

cause other household members to conduct themselves in a manner which will not disturb any public housing Resident's peaceful enjoyment of their accommodations and which will be conducive to maintaining the Memphis Housing Authority public housing developments in a decent, safe, sanitary and crime-free environment;

M. To refrain from illegal or other activity

which impairs the physical or social environment of the development, and cause other persons who are on the premises with the resident's consent to refrain from illegal or other activity which impairs the physical or social environment of the development or interferes with the health, safety or right of peaceful enjoyment of the premises by other residents;

N. To refrain from and cause household members, guests, or persons under the resident's control from engaging in any criminal activity or unlawful activity that threatens the health, safety or right to a peaceful enjoyment of the Memphis Housing Authority's public housing premises by other residents or employees of the Memphis Housing Authority which includes but is not limited to any drug-

related criminal activity on or off the premises;

The term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. 802), or of any other illicit drug).

The term "criminal activity" shall mean an act that

violates city, state, or federal criminal laws.

* * * *

15. TERMINATION OF THE LEASE

Management shall not terminate or refuse to renew the lease other than for serious or repeated violations of the material terms of the lease, the Resident Handbook, or MHA Statement of Policies, such as failure to make payment due under the lease or to fulfill the

resident's obligations set forth in Section 7, or for other good cause. The resident agrees that the violation of any of the obligations of residents A thru W is a serious violation of a material term of the lease, and is good cause for termination of the lease.

Either of the following types of criminal activity by the resident; any members of the household, a guest, or other person under the resident's

control, shall be cause for termination of tenancy and such termination shall be excluded from resident's right to a grievance hearing.

* * * *

B. Any drug-related criminal activity on or off the premises or alcohol abuse which interferes with the health, safety or right to peaceful enjoyment of the resident. The resident agrees that any drug-related criminal

activity on or off the premises interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents and is not conducive to maintaining Memphis Housing Authority Public Housing Development in a decent, safe, sanitary and crime-free environment and creates a threat to the health and safety of other residents.

The parties to this appeal sharply disagree as to the appropriate standard for determining whether eviction is proper under these lease provisions. Thompson and amicus curiae Tennessee Association of Legal Services argue that termination of a tenancy is proper only if a tenant knew or should have known of the drug-related criminal activity and failed to take appropriate action to prevent or halt the criminal activity. In contrast, MHA asserts that the lease provisions impose strict liability, meaning that termination of a tenancy and eviction are appropriate even if a tenant had no knowledge of the illegal activity.

No Tennessee court has considered this precise issue.[2] Courts in other jurisdictions are split on the

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[2] In framing their argument, both the appellant and the amicus curiae rely upon unreported intermediate appellate court decisions that construe similar lease provisions addressing generally disruptive or criminal conduct. However, these decisions are not particularly instructive since the language of both the lease

issue. Some courts have adopted the standard advanced by MHA and hold that such lease provisions impose strict liability for all drug-related criminal activity. See City of San Francisco Hous. Auth. v. Guillory, 49 Cal. Rptr.2d 367 (App. Dep't Super. Ct. 1995); Housing Auth. of New Orleans v. Green, 657 So.2d 552 (La. Ct. App. 1995); Ann Arbor Hous. Comm'n v. Wells, 618 N.W.2d 43 (Mich. Ct. App. 2000); Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700 (Minn. 1999); Syracuse Hous. Auth. v. Boule, 701 N.Y.S.2d 541 (App. Div. 1999). Emphasizing that the federal statute mandating these lease provisions does not contain an explicit knowledge requirement, these courts have refused to imply a knowledge requirement by the statute's use of the phrase "under the tenant's control." According to the Louisiana Court of Appeals:

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provisions and the federal statutes from which they are derived are different.

> knowledge requirements in statutes are so common in general and so obviously relevant to this particular issue that we reject the argument that Congress either failed inadvertently to include a knowledge requirement, somehow included it by implication, or said "control" but really meant knowledge.

Green, 657 So.2d at 554. The Michigan Court of Appeals concluded that the federal statute

> evinces a clear congressional intent to authorize termination of tenancy regardless of whether the tenant was aware that his household member or guest was selling, manufacturing, distributing, or using drugs.

Wells, 618 N.W.2d at 47 (quoting Rucker v. Davis, 203 F.3d 627, 637 (9th Cir. 2000), rev'd en banc Rucker v. Davis, Nos. 98-16322 & 98-16542, 2001 WL 55724 (9th Cir. 2001) (en banc)).

Moreover, these courts stress that regardless of their origin in federal law, provisions in public housing leases are contract terms to which the ordinary rules of contract interpretation apply. One such rule is that clear and unambiguous terms must be enforced without further interpretation, even if enforcement produces harsh results. See Guillory, 49 Cal. Rptr.2d at 369; Lor, 591 N.W.2d at 704. Finding no ambiguity in the phrase "any drug-related criminal activity," these courts conclude that the provision imposes strict liability and opine that the scope of this phrase is the same as the phrase "any drug related criminal activity including that of which the tenant is unaware." Wells, 618 N.W.2d at 47. Exemplifying this perspective, the California court observed that by

mandating such lease provisions "Congress enacted a straight-forward practical method of dealing with a serious public safety problem." Guillory, 49 Cal. Rptr.2d at 371; see also Boule, 701 N.Y.S.2d at 542.

While generally agreeing that clear and unambiguous lease provisions must be given their plain and ordinary meaning, several other courts have determined that these particular federally mandated lease provisions are not clear and unambiguous. Adopting the position advocated by Thompson and Amicus Curiae, these courts have construed the ambiguous provisions to permit eviction only if the tenant knew or should have known of the drug-related criminal activity and failed to prevent or halt it. See Rucker v. Davis, Nos. 98-16322 & 98-16542, 2001 WL 55724 (9th Cir. 2001) (en banc); Kimball Hill Management Co. v. Roper, 733 N.E.2d 458 (Ill. App. Ct. 2000); American Apartment Management Co. Inc. v. Phillips, 653 N.E.2d 834 (Ill. App. Ct. 1995); Diversified Realty Group, Inc. v. Davis, 628 N.E.2d

1082 (Ill. App. Ct. 1993); Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68 (N.C. Ct. App. 1995); Delaware County Hous. Auth. v. Bishop, 749 A.2d 997 (Pa. Commw. Ct. 2000). Noting that the term "control," used in the phrase "under the tenant's control," is not defined, these courts consider the legislative history of the federal statute from which these lease provisions were taken almost verbatim. See Patterson, 464 S.E.2d at 71; Bishop, 749 A.2d at 1002. Of particular importance is the congressional committee report that accompanied the 1990 Cranston-Gonzalez Affordable Housing Act, which stated:

> The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the [public housing authority] and the eviction court. For example, eviction

> would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5941; see also Patterson, 464 S.E.2d at 71; Bishop, 749 A.2d at 1002 (quoting and discussing the committee's report). The North Carolina Court of Appeals described this committee report as

> clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for a breach of the lease, i.e., if the tenant had knowledge of the criminal activities, or if the tenant had taken no reasonable steps under the circumstances to prevent the activity.

> The legislative history makes clear that Congress did not intend the statute to impose a type of strict liability whereby the tenant is responsible for all criminal acts regardless of her knowledge or ability to control them.

Patterson, 464 S.E.2d at 557. A majority of the United States Court of Appeals for the Ninth Circuit has also concluded that by this committee report Congress specifically rejected the notion that a public housing authority's discretion is so broad that it extends to the eviction of innocent tenants. See Rucker, 2001 WL 55724 at *10.

Sometimes cited as supporting the view that the statute does not impose strict liability is the HUD regulation which instructs:

> In deciding to evict for criminal activity, the [public housing authority] shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity.

24 C.F.R. § 966.4(l)(5)(i); see also 76 Tex. L. Rev. at 1520 (asserting that the regulation permits the public housing authority to exercise discretion, which indicates that the lease provisions do not impose strict liability).

After carefully reviewing these conflicting decisions, we consider the threshold inquiry to be whether or not the language of the lease provides a clear answer to the question presented. In Tennessee,

when construing a lease courts can not make a new contract for the parties. See Cain Partnership Ltd. v. Pioneer Inv. Services Co., 914 S.W.2d 452, 462 (Tenn. 1996). Where the wording of the lease is unambiguous, the clear language must be interpreted and enforced as written even though it contains terms which may be considered harsh and unjust by a court. Id. at 464. However, ambiguous lease provisions must be construed against the party drafting the lease. Id. at 462; see also Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 531 (Tenn. 1991); Marshall v. Jackson & Jones Oils, Inc., 20 S.W.3d 678, 682 (Tenn. Ct. App. 1999).

The lease provisions at issue in this appeal require Thompson

> [t]o refrain from and cause household members, guests, or persons under the resident's control from engaging in any criminal activity or unlawful activity . .

> . which includes but is not limited to any drug-related criminal activity on or off the premises.

The lease further provides that "[a]ny drug-related criminal activity on or off the premises" by Thompson, "any members of the household, a guest, or other person under the resident's control, shall be cause for termination of tenancy." These lease provisions refer to four separate categories of people: (1) the resident (Thompson); (2) household members; and (3) guests or (4) other persons under the resident's control. The phrase, "under the resident's control," relates only to the last two categories – guests or other persons. Although other courts have applied a single standard to all four categories, we conclude that applying a single standard is not consistent with the plain language of either the lease provisions in this case or the federal statutes from which they are derived. While both the language of this lease, and the federal

statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity, the language is not clear with respect to the standard that applies to a guest or other person under the resident's control. The phrase "under the resident's control" is not defined in the lease or in the federal statute. In addition, as previously stated, there is a split of authority among other jurisdictions as to the meaning of the phrase as it is used in the federal statute and the lease provisions derived from that statute. Where language in a contract or statute is susceptible of more than one reasonable interpretation the language is ambiguous. See Carter v. State, 952 S.W.2d 417, 419 (Tenn. 1997) ("The mere fact that this [statutory] phrase is reasonably interpreted either way makes it ambiguous. Where the language of a legislative provision is unclear, the Court should look behind the face of the statute to determine the legislature's intent."); Tata v. Nichols, 848 S.W.2d 649, 650-51

(Tenn. 1993) (applying this rule to an insurance contract and finding ambiguity because the term had been interpreted differently by various other jurisdictions considering the issue). This portion of the lease provision is ambiguous. As other courts have found, both the legislative history and the HUD regulation suggest that this ambiguous phrase should be interpreted as allowing evictions only if the tenant knew or should have known of the drug-related criminal activity of a guest or other person under the tenant's control. See Patterson, 464 S.E.2d at 71; Bishop, 749 A.2d at 1002. The congressional committee report specifically declares, "[f]or example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." (Emphasis added.) By allowing the public housing authority to consider the involvement or participation of family

members, the HUD regulation also suggests a knowledge requirement.

Finally, while a standard of strict liability is sensible when it is applied to the resident or household members, such a standard yields absurd results when it is applied to guests or other persons.[3] For example, eviction would be possible where a salesman or a pizza delivery person enters a public housing tenant's apartment in possession of drugs, even though the tenant had no knowledge or information about the drug-related criminal activity. We do not believe Congress intended such an absurd result.

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[3] A tenant will have no trouble ascertaining the identities of those persons for whom the tenant will be held strictly liable if all public housing authorities use leases similar to this one which requires the tenant to list all household members by relationship, age, and social security number and obligates the tenant to notify the public housing authority within ten days of the date on which the composition of the family changes.

Accordingly, we conclude that neither federal law nor the lease provisions impose a standard of strict liability for the drug-related criminal activities of Thompson's guests or other persons under her control.[4] The phrase "under the resident's control" permits eviction only if MHA establishes that Thompson knew or should have known of the drug-related criminal activity "of a guest or other person"and failed to take reasonable steps to prevent or halt it. Not only is this construction consistent with federal legislative history and HUD regulations, it is consistent with Tennessee law which requires that

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[4]Having so concluded, we need not address Thompson's assertion that a standard of strict liability for the drug-related criminal activity of others would violate her constitutional substantive due process right. It is well-established that courts decide constitutional issues only when necessary. See State v. Burdin, 924 S.W.2d 82, 87 (Tenn. 1996); Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995).

ambiguous terms in a lease be construed against the drafter of the instrument, in this case MHA.

Under this standard, both the public housing authority and the eviction court will be required to carefully consider the facts when an eviction is sought because of the drug-related criminal activities of a guest or other person under the tenant's control. In determining whether a tenant knew or should have known of the illegal conduct, courts should consider whether the guest or other person had a prior criminal record and, if so, whether the tenant had notice of the prior criminal record. As the Massachusetts Supreme Court held, a tenant's duty to take reasonable steps to prevent or halt illegal activity may on occasion require the tenant to seek outside intervention from social services agencies or law enforcement officials. See Spence v. Gormley, 439 N.E.2d 741, 265 (Mass. 1982). When a tenant has taken such measures, however, the tenant should not be held responsible for illegal activities that nevertheless occur. Id.

a.1.1 Conclusion

Having articulated the appropriate standard, we reverse the decision of the Court of Appeals and remand to the trial court for consideration of MHA's motion for summary judgment under the legal standard announced herein.

FRANK F. DROWOTA, III, JUSTICE

IN THE COURT OF APPEALS OF TENNESSEE, AT JACKSON

MEMPHIS HOUSING AUTHORITY,)
)
Shelby County Circuit Court
)
No. 94425 T.D.
Plaintiff/Appellee.)
)
VS.)
C.A. No. 02A01-9812-CV-00356
)
TARA THOMPSON,)
)

FILED
July 29, 1999

Defendant/Appellant.)

)

From the Circuit Court of Shelby County at Memphis.

Honorable Robert A. Lanier, Judge

Brenda Oates-Williams,
MEMPHIS AREA LEGAL SERVICES, INC.,
Memphis, Tennessee
Attorney for Defendant/Appellant.

Gregory L. Perry, Memphis, Tennessee
Attorney for Plaintiff/Appellee.

OPINION FILED: **July 29, 1999**

AFFIRMED AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S.: (Concurs)

HIGHERS, J.: (Concurs)

In this unlawful detainer action, Defendant Tara Thompson appeals the trial court's judgment granting the motion for summary judgment filed by Plaintiff/Appellee Memphis Housing Authority (MHA) and issuing a writ of possession in favor of MHA. We affirm the trial court's judgment based upon our conclusion that MHA properly terminated Thompson's lease after she violated the lease provisions by failing to cause one of her guests to refrain from engaging in drug-related criminal activity in her apartment.

MHA is a public housing authority within the meaning of the United States Housing Act. *See* 42 U.S.C.A. §§ 1437--1440 (West 1994 & Supp. 1999). MHA receives much of its funding through a subsidy from the United States Department of Housing and Urban Development (HUD), and its operation is governed by federal law and by HUD rules and regulations.

In 1988 and again in 1990, the United States Congress amended the Housing Act to address the problem of illegal drug activity and other criminal activity on public housing premises. As amended, the Act required public housing authorities to use leases which provided that

> any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any

> drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C.A. § 1437d(l)(5) (West 1994). Congress again amended the Act in 1996 to refer to any drug-related criminal activity "on or ***off*** such premises" rather than "on or ***near*** such premises." 42 U.S.C.A. § 1437d(l)(6) (West Supp. 1999) (emphases added).

Pursuant to Congress's directive, MHA required its public housing residents to sign lease agreements containing the following provisions:

7. OBLIGATIONS OF RESIDENT

Resident Agrees:

M. To refrain from illegal or other activity which impairs the physical or social environment of the development, and cause other persons who are on the premises with the resident's consent to refrain from illegal or other activity which impairs the physical or social environment of the development or interferes with the health, safety or right of peaceful enjoyment of the premises by other residents.

N. To refrain from and cause household members, guests or persons under the resident's control [to refrain] from engaging in any criminal activity or unlawful activity that threatens the health, safety or right to a peaceful enjoyment of [MHA's] public housing premises by other residents or employees of [MHA] which includes but is not limited to any drug related criminal activity on or off the premises;

15. TERMINATION OF THE LEASE Management shall not terminate or refuse to renew the lease other than for serious or repeated violations of the material terms of the lease, . . . such as failure to make payment due under the lease or to fulfill the resident's obligations set forth in Section 7, or for other good cause. The resident agrees that the violation of any of the obligation of residents A thru W is a serious violation of a material term of the lease, and is good cause for termination of

the lease.

Either of the following types of criminal activity by the resident; any members of the household, a guest, or other person under the resident's control, shall be cause for termination of tenancy and such termination shall be excluded from resident's right to a grievance hearing.

A. Any criminal activity or unlawful activity that threatens the health, safety or right to peaceful enjoyment of the premises of the residents or

employees of [MHA].

B. Any drug related criminal activity on or off the premises or alcohol abuse which interferes with the health, safety or right to peaceful enjoyment of the resident. The resident agrees that any drug related criminal activity on or off the premises interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents and is not conducive to maintaining [MHA] Public Housing Development in a decent, safe, sanitary and crime-free environment

> and creates a threat to the health and safety of other residents.

Tara Thompson and her three children live in MHA's Fowler Homes Housing Development. In order to obtain housing in Fowler Homes, Thompson signed a Dwelling Lease and Lease Addendum with MHA that contained the foregoing provisions.

On February 6, 1998, Thompson saw Tallen Williams, the father of her youngest child, "hanging out" at Fowler Homes. At Thompson's request, Williams agreed to go to Thompson's apartment to watch her children while she went to do laundry. While Williams was in Thompson's apartment, officers of the Memphis Police Department, acting pursuant to a search warrant, raided the apartment, found 0.4 grams of cocaine in Williams' possession, and arrested him.

Thompson had no prior knowledge of Williams' illegal drug activity. Thompson knew that Williams had been jailed in December 1997 for violating the terms of his probation, but Thompson did not know the nature of the underlying offense for which Williams was serving probation. Thompson did not ask Williams why he was on probation, and Williams did not volunteer this information.

Despite Thompson's lack of prior knowledge of Williams' illegal drug activity, MHA notified Thompson that it was terminating her lease based upon her violation of the lease provisions prohibiting drug-related criminal activity on the premises. When Thompson failed to vacate the apartment, MHA brought this unlawful detainer action against her.

This action initially was tried in the General Sessions Court, where a judgment for possession was entered in favor of MHA. After Thompson appealed the judgment to the Circuit Court,

MHA moved for summary judgment, contending that, as a matter of law, it was entitled to terminate Thompson's lease based upon her violation of the lease provisions prohibiting drug-related criminal activity on the premises. The trial court initially denied MHA's motion; however, upon MHA's motion for reconsideration, the trial court granted MHA's motion for summary judgment and issued a writ of possession in favor of MHA.

On appeal, Thompson contends that the trial court erred in entering a judgment in favor of MHA when the record contained no evidence that Thompson was at fault in allowing Williams to possess illegal drugs in her apartment. Specifically, Thompson asserts that the record contained no evidence that she either knew about Williams' illegal drug activity or had the ability to control Williams' conduct.

We conclude that this argument lacks merit. In construing similar lease provisions, courts in other jurisdictions have ruled that a public housing

authority may evict a tenant without presenting proof that the tenant knew of or had the ability to foresee or control the illegal activity of a household member or guest. In ***City of South San Francisco Housing Authority v. Guillory***, 49 Cal. Rptr. 2d 367, 369 (Cal. App. Dep't Super. Ct. 1995), the lease provision at issue required the tenants to "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the premises." Citing this provision, the housing authority filed an unlawful detainer action against the tenants after a lawful search of their apartment revealed narcotics in their son's bedroom. In pursuing its unlawful detainer action, the housing authority stipulated that it could produce no evidence that the tenants "knew of, controlled, acquiesced in, or had reason to know" of their son's possession of narcotics. ***Guillory***, 49 Cal. Rptr. 2d at 369. Despite this stipulation, the trial court entered a judgment for the

housing authority, ruling that it properly terminated the tenants' lease "based solely on the fact that narcotics were found in the apartment." ***Id.*** at 370.

In affirming the trial court's judgment, the appellate court first rejected the tenants' argument that the subject lease provision was ambiguous:

> This argument has no merit. The language of the lease with respect to drug use and possession on public housing premises is clear and unambiguous. The terms of paragraph 11(o) of the lease have a plain and obvious meaning. By signing the lease with

[the housing authority], [the tenants] agreed to assure that no drugs would be possessed or used on their premises by any member of their household. There is no ambiguity in what [the tenants] were obligated to do, particularly when paragraph 11(o) of the lease is read in conjunction with the other lease provisions which also clearly and explicitly prohibit drug-related activity. The lease between [the tenants] and [the housing authority] is

> therefore a valid contract. The facts as stipulated in the court below demonstrate [the tenants] violated that contract. [The housing authority], acting pursuant to the contract, acted within its lawful authority in enforcing the contract by evicting [the tenants].

Guillory, 49 Cal. Rptr. 2d at 370. The appellate court also rejected the tenants' argument that they could not be evicted unless they had knowledge of or the ability to foresee their son's criminal conduct:

> [The tenants'] argument overlooks the fact that [they] were evicted for failure to assure that no drug-related criminal activity occur in their premises. [The tenants] were not evicted for the conduct of [their son]. The eviction was based on [the tenants'] failure to assure that illegal drug-related conduct did not take place in their household.

Id. at 372.

In ***Housing Authority of New Orleans v. Green***, 657 So. 2d 552, 553 (La. Ct. App.), ***writ denied***, 661 So. 2d 1355 (La. 1995), ***cert.***

denied, 517 U.S. 1169 (1996), the lease provision at issue prohibited the tenant, any member of the tenant's household, or a guest or other person under the tenant's control from engaging in criminal activity, including drug-related criminal activity, on or near the housing authority's premises. The housing authority brought eviction proceedings against the tenant after illegal drugs were found in her apartment. The proof at trial established that the drugs belonged to an acquaintance of the tenant's daughter. Although the housing authority did not prove that the tenant had any knowledge of the presence of the drugs in her apartment, the trial court entered a judgment evicting the tenant.

The appellate court affirmed the trial court's judgment of eviction, specifically rejecting the tenant's argument that the trial court erred in evicting her when the housing authority failed to prove that she had knowledge of the illegal drugs in her apartment or that she had control over the actions of her daughter's

acquaintance. As did the ***Guillory*** court, the appellate court found the lease provision's anti-drug language to be "clear and unambiguous." ***Green***, 657 So. 2d at 555. Upon examining this and other lease provisions, the court concluded that the lease contained no knowledge requirement:

> [W]here Section 15 of the lease refers to "a guest or other person under the tenant's control" it means that the tenant "controls" who has access to the premises. The lease makes the tenant responsible for the drug activities of those persons given access to the apartment by the

> tenant. "Control" as used in the lease in no way implies that the tenant knew or should have known of the drug activity, and there is no other provision in the lease that would make tenant knowledge of drug activity a necessary precondition of eviction.

Id. at 554. The court also refused to read such a knowledge requirement into the language of the Housing Act, as amended in 1988 and 1990, upon which the housing authority had based the subject provision. The court explained:

> Knowledge requirements in statutes are so common in general and so obviously relevant to this particular issue that we reject the argument that Congress either failed inadvertently to include a knowledge requirement, somehow included it by implication, or said "control" but really meant knowledge.

Id. (citing 42 U.S.C.A. § 1437d(l)).

In accordance with these authorities, we hold that the trial court properly entered summary judgment in favor of MHA in this unlawful detainer

action against Thompson. The lease provisions relied upon by MHA required Thompson to cause household members, guests, or persons under her control to refrain from any criminal activity that threatened the health, safety, or right to peaceful enjoyment of the premises by other tenants. In executing the lease and addendum, Thompson agreed that the activity prohibited by these provisions included any drug-related criminal activity on or off the premises. Thompson also acknowledged that any such criminal activity by a member of her household, a guest, or other person under her control would constitute good cause for termination of the lease and her tenancy.

The language of these provisions is clear and unambiguous. By signing the lease with MHA, Thompson agreed to cause her guests, such as Williams, to refrain from engaging in any drug-related criminal activity while on the premises. Thus, the lease provisions placed upon Thompson the affirmative obligation to ensure that her guests did not

engage in drug-related criminal activity while in her apartment. In light of the affirmative nature of this obligation, Thompson's actual or constructive knowledge of Williams' drug-related criminal activity was irrelevant. Regardless of her knowledge of Williams' drug activity, under the terms of her lease, Thompson became responsible for such activity once she granted Williams access to her apartment.

Even when viewed in the light most favorable to Thompson, the evidence presented below demonstrated that Thompson violated her lease with MHA when she granted Williams access to her apartment and subsequently failed to cause Williams to refrain from possessing illegal drugs while in the apartment. Under these circumstances, MHA had the right to enforce the lease provisions by evicting Thompson.

In contending that an eviction requires a showing of some degree of fault on the part of the tenant, Thompson cites authorities indicating (1) that a

housing authority should exercise its discretion in light of all the relevant circumstances when it decides whether to evict a tenant for criminal activity, (2) that the relevant circumstances include, ***inter alia***, the tenant's knowledge of the criminal activity and the tenant's efforts to prevent the activity, and (3) that the housing authority's decision is subject to review by the courts.

In its report accompanying the 1990 amendments to the Housing Act, for instance, the congressional committee included the following statements:

> The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the [housing authority]

> and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 101-316, at 179 (1990), ***reprinted in*** 1990 U.S.C.C.A.N. 5763, 5941. Moreover, a HUD regulation provides that, in deciding whether to evict for criminal activity, a housing authority

> shall have discretion to consider all of the circumstances of the

case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the [housing authority] may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit.

24 C.F.R. § 966.4(l)(5)(i) (1998). Finally, HUD's "One Strike" policy contains the following statements:

> [Housing authorities] retain the flexibility to handle these cases on an individualized basis, and they should exercise reasonable discretion in light of all the relevant circumstances. In particular, when a tenant has taken all reasonable steps to prevent the criminal activity, eviction may not always be warranted or proper. To ensure both humane

> results and success in court, [housing authorities] should undertake a case-by-case analysis before proceeding with eviction. If they do seek eviction, [housing authorities] should be prepared to persuade a court that eviction is justified.

Syracuse Hous. Auth. v. Boule, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996) (quoting HUD's "One Strike and You're Out" statement of policy in public housing issued in March 1996), ***aff'd***, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998). Relying upon these authorities, some courts have held that a tenant may be evicted for the drug-related criminal activity of a guest

or household member only if the tenant is personally at fault for the criminal activity, such as where the tenant had knowledge of the criminal activity or where the tenant failed to take reasonable steps to prevent the activity. ***See Charlotte Hous. Auth. v. Patterson***, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995); ***see also Syracuse Hous. Auth. v. Boule***, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), ***aff'd***, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998).

We decline to adopt such a standard in this case. As we previously discussed, the language of the lease signed by Thompson was clear and unambiguous. The lease included no knowledge requirement but instead placed upon Thompson the affirmative obligation to cause her guests to refrain from engaging in illegal drug activity while on the premises. Moreover, the language of the Housing Act contained no such knowledge requirement. As one appellate court observed, "[t]hat a Congressional committee may not have intended for tenant evictions

to take place in the absence of knowledge, does not change the fact that when the Congress as a whole enacted [the 1990 amendments to the Housing Act] it did so without the imposition of a knowledge requirement." ***Housing Auth. of New Orleans v. Green***, 657 So. 2d 552, 554 (La. Ct. App.), ***writ denied***, 661 So. 2d 1355 (La. 1995), ***cert. denied***, 517 U.S. 1169 (1996).

We further note that, although HUD regulations appear to grant housing authorities the discretion to evict tenants based on the criminal activity of their guests or household members, courts and other legal authorities have begun to question the extent to which courts may review a housing authority's exercise of that discretion. In refusing to inquire into a tenant's knowledge of or ability to foresee the criminal activity of her son, for example, the Supreme Court of Minnesota opined that

[d]espite HUD's careful clarification of [housing authority] responsibilities, the regulations do not give courts similar discretion when hearing evictions involving the criminal acts of household members. Rather, when discussing the role of courts in such evictions, HUD regulations require only that courts provide due process. In light of HUD's careful crafting of the [housing authority's]

role in eviction decisions, HUD would likely have spelled out any additional supervisory responsibilities it wished courts to take. Thus, HUD regulations, while providing tenants access to trial courts, do not empower trial courts to consider external circumstances in eviction proceedings.

. . . .

. . . [A] lease is a form of contract.

Unambiguous contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh. When a lease empowers a landlord to evict for certain actions, then the trial court shall determine ***de novo*** whether the facts alleged in the complaint are true and whether those facts, under the terms of the lease, support termination of the lease and eviction.

Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700, 703-04 (Minn. 1999) (footnotes omitted) (citing 24 C.F.R. § 966.4(l)(3)(v)(B)); ***see also*** William F. Maher, ***Wisdom Revisited: Judicial Intervention and the Exercise of Discretion in "Strict Liability" Public Housing Evictions***, J. Affordable Hous. & Community Dev. L., Spring 1998, at 218, 221-26.

Under this limited scope of review, the trial court's only role in this unlawful detainer action was to determine whether Williams engaged in drug-related criminal activity while he was on the premises as Thompson's guest and, thus, whether the lease provisions prohibiting such criminal activity were breached. In light of the parties' stipulation that Williams was arrested for possession of cocaine while in Thompson's apartment at her invitation, we conclude that the trial court properly entered summary judgment in favor of MHA.

The trial court's judgment is affirmed, and this cause is remanded for further proceedings

consistent with this opinion. Costs of this appeal are taxed to Ms. Thompson, for which execution may issue if necessary.

FARMER, J.

CRAWFORD, P.J., W.S. (Concurs)

HIGHERS, J. (Concurs)

IN THE CIRCUIT COURT OF TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

MEMPHIS HOUSING AUTHORITY,

Plaintiff,

Docket # 94425-7 T.D.

vs.

TARA THOMPSON,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF

This matter came to be heard on October 30, 1998, upon the motion of the plaintiff to reconsider

the court's previous ruling which denied plaintiff's motion for summary judgment; upon oral argument at which time it was pointed out that the court had failed to take into consideration the defendant's deposition in making its ruling, the court not being restricted to the written stipulation of facts in considering the motion for summary judgment; upon stipulations of counsel; upon considering the deposition of the defendant; and, from the entire record in this cause, from all of which it appears to the Court and the Court finds that:

Plaintiff is entitled to a summary judgment in its favor in this case. A writ of possession shall issue forthwith and Defendant shall pay the costs of the clerk of the general sessions court and the clerk of the circuit court.

For all of which, let execution issue.

_____

Judge Robert A. Lanier

DATE: _____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed to: Gregory L. Perry, Esq., 700 Adams Avenue, Memphis, TN 38103 and Brenda Oats-Williams, Esq., 109 N. Main Street, Memphis, TN 38103, by U.S. Mail, postage prepaid, on this the __9__ day of November, 1998.

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DEPUTY CLERK

IN THE CIRCUIT COURT OF TENNESSEE

FOR THE

THIRTIETH JUDICIAL DISTRICT AT

MEMPHIS, SHELBY COUNTY

MEMPHIS HOUSING AUTHORITY,

Plaintiff,

vs.

Docket #94425-7 T.D.

TARA THOMPSON,

Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter came on to be heard on August

28, 1998, upon the motion of the plaintiff for summary judgment; upon argument of counsel; upon briefs of counsel; upon affidavits in support of the motion; upon stipulations of counsel; and, from the entire record in this cause, from all of which it appears to the Court and the Court finds that:

For the purposes of this motion, the facts are as follows:

Defendant Tara Thompson lives in public housing with her three minor children. Tallen Williams is the father of Ms. Thompson's youngest child. On February 6, 1998, Ms. Thompson saw Mr. Williams on the grounds of the Fowler Homes Development. Mr. Thompson was not engaged in any gainful activity, so Ms. Thompson asked Mr. Williams to come to her apartment and watch his son and her two other children while she went to the laundry. He agreed and went to the apartment. While there, the Memphis Police Department, executing a warrant for his arrest, entered the

defendant's apartment, arrested Mr. Williams and thereupon found a small amount of cocaine in his possession and arrested him for possession of a controlled substance. Defendant did not know of his drug use until so informed by the police. The cocaine belonged to Mr. Williams. He later pleaded guilty to possession of a controlled substance. The plaintiff is a federally-subsidized public housing authority. The plaintiff has given Defendant notice to leave the premises and, upon her failure to do so, filed an action in the General Session Court for unlawful detainer. The matter has been appealed to this court. In this case, the court is called upon to construe the lease agreement between the plaintiff and the defendant. The pertinent part of that agreement requires the defendant to

> M. . . . cause other persons who are on the premises with the resident's consent to refrain from

illegal or other activity which impairs the physical or social environment of the development;

N. . . . refrain from and cause. . . guest [sic] from any criminal activity . . . which includes but is not limited to any drug related criminal activity . . . which includes but is not limited to any drug related criminal activity on or near such premises; . .

Paragraph 15 of the lease provides for its termination, and reads as follows:

15. . . . either of the following types of criminal activity by . . . a guest . . . shall be cause for termination of tenancy . . .

B. Any drug related criminal activity

on or near such premises, . . .

Plaintiff also signed an addendum to the lease; effective May 1, 1997, which amended Paragraph N of the lease to read as follows:

> N. To refrain from and cause . . . guests . . . from engaging in any criminal activity . . . which includes but is not limited to any drug related criminal activity on or off the premises;
> The term "drug-related criminal activity" means the illegal . . . possession with intent to . . . use, of a controlled substance . . . or any other illicit drug.
> The term "criminal activity"

shall mean an act that violates city, state or federal criminal laws.

The ordinary and usual meaning of the word "cause" as a verb is to make something happen. It refers to a positive, rather than passive behavior. According to *Black's Law Dictionary*, (Fourth Edition), a meaning of the word is "to effect, to bring about; to bring into existence." According to *Webster's Seventh New Collegiate Dictionary*, a primary meaning of the word is "to effect by command, authority or force." The word, therefore, denotes an affirmative duty upon the tenant to bring about the absence of drug possession on the leased property. This is consistent with the policy behind the addendum. The Memphis Housing Authority, on August 29, 1996, adopted a "zero tolerance" and, "one strike policy," for such behavior as allowing guests to possess illegal drugs on the

premises. The Memphis Housing Authority did, however purport to reserve to itself the "flexibility" to use discretion to decide whether termination of the lease was proper and to reach "humane" results, especially when a tenant "has taken all reasonable steps to prevent" the criminal activity. (Affidavit of Estelle Brooks). While the intent of the Memphis Housing Authority, alone, cannot govern the interpretation of the lease, it certainly shows the purpose of the addendum. "One strike," in baseball parlance means that, whereas the batter is "out" in baseball after three strikes, the tenant may be evicted after one "strike," or default, in the subject obligation.

It seems to be suggested by the defendant that such a lease provision, if so intended, would violate the intention of Congress, as expressed in the statute governing federally-assisted public housing and the regulations made pursuant thereto, and be, therefore, forbidden. However, the language of

neither the statute nor the regulations compels such a conclusion. The statute requires public housing authorities to inset terms in their leases that

> Provide that any criminal activity... or any drug-related criminal activity on or near such premises, engaged in by a . . . guest or other person under the tenant's control, shall be cause for termination of tenancy; . . . [42 U.S.C.A.§ 1437d(1)(5)].

Moreover, the regulation promulgated by HUD pursuant to the statute provides, in material part, that in their leases, tenants must

> . . assure that the tenant . . . a guest, or any person under tenant's control, shall not engage in: (B) any drug related criminal activity on or near such premises. [24

C.F.R.§966.4(f)(12)(I)(1993)].

The word "assure," once again, conveys a strict standard of responsibility. *Black's Law Dictionary,* (Fourth Edition), gives these definitions of "assure:"

> To make certain and put beyond doubt, ... Used interchangeably with insure in insurance law; in real property documents it means a warranty; . . .

The history of federal public housing legislation evidences a clear pattern of ever-increasing intolerance of any illegal drug activity by tenants or their guests, even when off the premises. [See 1996 Amendment to the Federal Housing Opportunity Program Extension Act, Section 9 (a) (6)]. The defendant quotes the following Senate Committee report language in the 1990 version of

the act in support of her position:

> This section would make it clear that criminal activity, including drug related criminal activity, can be cause for eviction only if it is adversely affects the health, safety, and quiet enjoyment of the premises. The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of human judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

It is to be noted that the language above is from the Senate report on the 1990 Bill. The conference report of both Houses of Congress upon the final legislation contains the following report to Congress:

> The conference report contains the Senate provision amended to read that each public housing agency shall utilize leases which provide that *any criminal activity* that threatens the health, safety, or right to peaceful enjoyment to the premises by other tenants or *any drug-related criminal activity* on or near such premises engaged in by a public housing tenant, any member of the tenant's household, or *any guests* or any other person under the tenant's control, *shall be cause for termination of*

tenancy (emphasis added). (U.S. code Congressional and Administrative News, 101st Congress, 2nd Session, 1990, Volume 8, Page 6, 123).

It will thus be seen that the final version of the bill reported to the Congress does not contain the same language contained in the Senate Committee Report. The best evidence of the statutory purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that statute is unambiguous, it should not be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. *West Virginia University v. Casey,* 499 U.S. 83 (1991).

It has been argued that a policy of strict liability would render a tenant subject to eviction if an appliance repairman with a marijuana cigarette in

his possession was summoned innocently by the tenant. *Syracuse Housing Authority v. Boule*; 172 Misc. 2d; 658 N.Y.S. 2d 776 (1996). In such a situation, the housing authority retains the discretion to consider whether the tenant had reasonable steps to prevent such an offence. It might just easily be argued that a tenant could escape eviction by making no investigation of, or remaining purposefully ignorant about her guests, even though they regularly carried quantities of drugs secreted upon their persons or had criminal records strongly indicating a propensity to pursue illegal activities.

A contract may not be interpreted so as to reach an absurd result. *Gibson v. International Harvester*, 557F. Supp. 1000 (P.C. Tenn. 1983). The intention of a contract must be gathered from the four corners of the instrument if possible. A literal interpretation of some of the clauses of the contract, quoted above, would make a tenant responsible for, and subject to eviction because of,

drug-related criminal activity by a person who had once been a guest of the tenant, long after he had left the tenant's premises. This would be an unreasonable interpretation of the express words of the contract. If that is not the meaning of the contract, then something less than an absolute and strict liability for the acts of former or present guests must be intended by the contract and the statute. Both the statute and the contract could have easily contained the terms, "regardless of fault," or, "strict liability." Neither term is used. This leads to the inference that some fault, however slight, upon the part of the tenant is intended to be required. It may be an act of omission or an act of commission. It may be the failure to make adequate inquiry as to the character, history, status, conditions, and activities of the guest, or failure to take precautions based upon information known to the tenant. It is obvious from the foregoing legislative history and contract terminology that the standard of fault upon the part

of the tenant would not be great and the burden of proof on the housing authority would be slight. While the terms of a written contract may not be varied or contradicted by oral evidence in a case of patent ambiguity, proof of the entire circumstances surrounding a contract and its execution may be considered to understand its intent. Contracts will be construed so as to avoid internal conflicts if possible. Where other rules of construction fail to give certainty to the written expression, doubtful language in the contract should be interpreted most strongly against the party who drew or prepared it. *Coble v. Gifford*, 627 S.W. 2d 359 (Tenn. App. 1982).

Applying the foregoing rules, the court concludes that, while the contract places a heavy burden upon a tenant to take an active role in preventing the use of the premises by guests of the tenant who are engaged in illegal or drug-related activity, an entirely innocent tenant, whose

ignorance of the activity is not due to indifference or lack of precautions on his or her part, should not be a basis for eviction.

The court notes that there is a deposition in the file which appears to contain testimony given by the defendant. However, no reference to the deposition is made in the written stipulation entered into by the parties or in the briefs of the parties. Therefore, the court does not consider that in deciding this motion. The motion is based entirely upon the facts contained in the stipulation and in the briefs of the parties. From these, insufficient basis for a summary judgment at this time is shown by the plaintiff.

WHEREFORE, plaintiff's motion for a summary judgment is overruled, and all other matters are reserved.

JUDGE ROBERT A. LANIER

DATE:_____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed to: Gregory L. Perry, Esq., 700 Adams Avenue, Memphis, TN 38103 and Brenda Oats-Williams, Esq., 109 N. Main Street, Memphis, TN 38103, by U.S. Mail, postage prepaid, on this the 2nd day of October, 1998.

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DEPUTY CLERK

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MEMPHIS HOUSING AUTHORITY v. TARA THOMPSON

Circuit Court for Shelby County
No. 94425-T.D.-7

No. W1998-00108-SC-R11-CV

The Court has considered Memphis Housing Authority's petition to rehear and is of the opinion that the petition should be and hereby is DENIED.

However, we agree with Memphis Housing Authority that the opinion at page 11 incorrectly characterizes its assertions at oral argument. Accordingly, the opinion is corrected by withdrawing page 11 and substituting in its

stead-revised page 11, attached hereto. The revisions do not change the substantive analysis or the result of the opinion filed on February 20, 2001. Accordingly, the time for filing a petition to rehear does not begin anew.

PER CURIAM

allowing the public housing authority to consider the involvement or participation of family members, the HUD regulation also suggests a knowledge requirement.

Finally, while a standard of strict liability is sensible when it is applied to the resident or household members, such a standard yields absurd results when it is applied to guests or other persons.[3] For example, eviction would be possible where a salesman or a pizza delivery person enters a public housing tenant's apartment in possession of drugs, even though the tenant had no knowledge or information about the

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3 A tenant will have no trouble ascertaining the identities of those persons for whom the tenant will be held strictly liable if all public housing authorities use leases similar to this one which requires the tenant to list all household members by relationship, age, and social security number and obligates the tenant to notify the public housing authority within ten days of the date on which the composition of the family changes.

drug-related criminal activity. We do not believe Congress intended such an absurd result.

Accordingly, we conclude that neither federal law nor the lease provisions impose a standard of strict liability for the drug-related criminal activities of Thompson's guests or other persons under her control[4] The phrase "under the resident's control" permits eviction only if MHA establishes that Thompson knew or should have known of the drug-related criminal activity "of a guest or other person" and failed to take reasonable steps to prevent or halt it. Not only is this construction consistent with federal legislative history and HUD regulations, it is

---

4 Having so concluded, we need not address Thompson's assertion that a standard of strict liability for the drug-related criminal activity of others would violate her constitutional substantive due process right. It is well-established that courts decide constitutional issues only when necessary. See State v. Burdin, 924 S.W.2d 82, 87 (Tenn. 1996); Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995).

consistent with Tennessee law which requires that ambiguous terms in a lease be construed against the drafter of the instrument, in this case MHA.

Under this standard, both the public housing authority and the eviction court will be required to carefully consider the facts when an eviction is sought because of the drug-related criminal activities of a guest or other person under the tenant's control. In determining whether a tenant knew or should have known of the illegal conduct, courts should consider whether the guest or other person had a prior criminal record and, if so, whether the tenant had notice of the prior criminal record. As the Massachusetts Supreme Court held, a tenant's duty to take reasonable steps to prevent or halt illegal activity may on occasion require the tenant to seek outside intervention from social services agencies or law enforcement officials. See Spence v. Gormley, 439 N.E.2d 741, 265 (Mass. 1982). When a tenant has taken such measures,

however, the tenant should not be held responsible for illegal activities that nevertheless occur. Id.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Public and Indian Housing

Special Attention of:

Under the Jurisdiction of the United States Court of Appeals for the Ninth Circuit:

Selected Public Housing Agencies, Public Housing Directors; State/Area Coordinators; Public Housing Resident Management Corporations; Assistant General Counsel; Chief Counsel; Chief Attorneys

NOTICE PIH 2001-8 (HA)

Issued: March 13, 2001

Expires: March 31, 2002

SUBJECT: Termination of Tenancy for Criminal Activity

Applicability: All Public Housing Agencies (PHAs) administering public housing within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Applicable States and Possessions: California, Washington, Montana, Oregon, Idaho, Nevada, Arizona, Hawaii, Alaska and Northern Mariana Islands and Guam.

Policy: This notice is to advise PHAs of the effect of *Rucker v. Davis* on their ability to evict households from public housing on the basis of criminal activity committed by certain persons other than the public housing leaseholder (*i.e.*, the lease signatory). This decision by the United States Court of Appeals for the Ninth Circuit interpreted Section 6(1)(6) of the U.S. Housing Act of 1937, as amended, in a way that is contrary to HUD's

interpretation, which applied to all PHAs nationwide.

In promulgating the regulation at 24 CFR 966.4(f)(12), HUD determined that because Section 6(1) requires every lease signed by the tenant of a public housing unit to contain a provision authorizing his or her PHA to consider certain "criminal activity ... engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" to be "cause for termination of tenancy", the lease provision authorizes the termination of the leasehold and thus eviction of all members of a household whenever such criminal activity is committed by any member of the household or by any household guest. 56 *Fed. Reg.* 51560, 51562-51563, 51566-51567 (October 11, 1991).

In a 7 to 4 decision, 237 F.3d 1113 (9th Cir. 2001), the Ninth Circuit rejected that interpretation. The majority opinion concluded that Congress

could not have intended that, when the criminal activity is committed by a household member or guest, a leasehold could be terminated without a showing of particularized leaseholder fault. The Court thus, in our opinion,1 read into the statute the following additional terms that would bar such a termination for criminal activity committed:

(a) **outside** the leaseholder's unit, absent PHA proof that the leaseholder failed to take "reasonable steps to prevent drug activity from occurring" in circumstances in which the leaseholder "knew or should have known of the criminal activity" and could "realistically exercise control over the conduct of [the] household member or guest"; and

---

1 This is only HUD's understanding of the Ninth Circuit opinion. Each PHA should independently review the decision.

(b) **inside** the leaseholder's unit, if the leaseholder introduces evidence sufficient to overcome the legal "presumption" that because the unit is an area over which the leaseholder has control and with respect to which the leaseholder can grant or deny access, the leaseholder must have failed to take all requisite steps to prevent criminal activity from occurring there.

Because the decision is binding precedent within the Ninth Circuit, PHAs within the Ninth Circuit are instructed to disregard HUD's interpretation of Section 6(1)(6) and follow the Ninth Circuit interpretation of the statute.

____/s/_____

Gloria J. Cousar

Acting General Deputy Assistant

Secretary for Public and Indian Housing

Supreme Court, U.S.
FILED
JUL 27 2001
CLERK

(3)

No. 00-1861

In The

Supreme Court of the United States

MEMPHIS HOUSING AUTHORITY,

Petitioner,

v.

TARA THOMPSON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED FOR REVIEW

Whether public housing lease language required by 42 U.S.C. § 1437d(1)(6) authorizes the eviction of a tenant for the drug-related criminal activity of a guest if the tenant has no knowledge of or ability to prevent such activity.

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STATEMENT OF THE CASE

Tara Thompson ("Thompson"), the Respondent in this cause, lives in public housing with her three minor children. She has lived in Memphis Housing Authority's Fowler Homes development ("Fowler Homes") since April of 1996. From April of 1996 until October of 1997, she lived with her mother, who is a tenant in Fowler Homes. Thompson executed a Dwelling Lease with the Memphis Housing Authority ("MHA"), the Petitioner, on October 17, 1997 for 904 Latham, # 76 and soon thereafter moved into her own apartment. The lease signed by Thompson contained an Addendum which makes drug-related criminal activity "by the resident, any member of the household, a guest, or other person under the resident's control . . . " grounds for termination of the lease.

The youngest of Thompson's children was born in January of 1998, after she moved to her new apartment in Fowler Homes. The father of her youngest child is Tallen Williams ("Williams"), whom Thompson met in the Fowler Homes development some time in 1996. Apparently Williams and/or two of his brothers lived in Fowler Homes at some point during the period from September of 1991 until April of 1996, and Williams continued to be on the grounds of Fowler Homes frequently through February of 1998. Williams and Thompson had never lived together and saw each other only occasionally. He was not on the lease for 904 Latham, # 76.

Williams had been arrested for possession of marijuana on the grounds of Fowler Homes in December of 1997. Although Thompson visited Williams in jail, she did

not know he had been arrested on a drug charge. Williams had apparently misled Thompson about the reason he was in jail.

On or about February 6, 1998, Thompson was preparing to do laundry when she saw Williams on the grounds of Fowler Homes with some friends. She asked him to watch the baby while she went to the complex laundromat. Williams agreed and came to her apartment.

During the time that Williams was in the apartment, police officers came to the door to execute a search warrant. They seized a substance which proved to be approximately 0.4 grams of cocaine. Williams was arrested and later pleaded guilty to possession of a controlled substance; however, Thompson was not charged or accused of any culpability in the incident. MHA has stipulated that Thompson had no direct knowledge of Williams' illegal drug activity prior to February 6, 1998. She had no actual knowledge that he had illegal drugs in his possession on February 6, 1998.

Nonetheless, on or about February 13, 1998, Thompson received a Three Day Notice Of Termination Of Lease citing the criminal conduct of "[a]n individual, who identified himself as living with resident. . . . " When she did not vacate her apartment pursuant to the lease termination notice, a Forcible Entry and Detainer action was commenced in the Shelby County General Sessions Court. After a hearing, the general sessions court granted a judgment for "possession only" to MHA on April 22, 1998.

On May 1, 1998, Thompson perfected an appeal to the Circuit Court of Shelby County for the Thirtieth Judicial Circuit at Memphis. MHA moved for summary judgment, but the court denied the motion while rejecting the argument of "strict liability" for the acts of guests or household members of public housing tenants and finding that at a minimum, an innocent and unknowing tenant's ignorance of the activity would have to arise out of "indifference or lack of precaution" on his or her part to justify lease termination. MHA App. at 97a-98a. Subsequently, MHA filed a renewed motion for summary judgment in which MHA argued that there had been some fault on Thompson's part in that she had not made reasonable inquiry into the reasons for Williams' prior jailing. The court granted summary judgment to MHA. MHA App. at 81a.

Thompson filed a timely appeal to the Tennessee Court of Appeals, Western Section on December 7, 1998, arguing that the trial court erred in granting summary judgment, because she neither had prior knowledge of Williams' drug use, nor could she control his conduct. The court of appeals affirmed the trial court. MHA App. at 78a.

Thompson next filed an application with the Tennessee Supreme Court for permission to appeal the appellate court's decision on the issue of whether MHA's lease provisions imposed strict liability on the lease holder for the drug-related criminal activities of guests or other people under the tenant's control. The supreme court granted Thompson's application, reversed the appellate court's decision, and remanded the case to trial court for

reconsideration of MHA's motion for summary judgment. *Memphis Housing Authority v. Thompson,* 38 S.W.3d 504 (Tenn. 2001); MHA App. at 43a. The supreme court held that eviction is only proper if the tenant "knew or should have known of the drug-related criminal activity 'of a guest or other person' and failed to take reasonable steps to prevent or halt it." MHA App. at 41a.

REASONS FOR DENYING THE WRIT

There is no compelling reason under Supreme Court Rule 10 for the Court to grant Memphis Housing Authority's petition for writ of certiorari. The petitioner contends that the Tennessee Supreme Court has decided an important federal question in a way that conflicts with the Ninth Circuit Court of Appeals' decision in *Rucker v. Davis,* 237 F.3d 1113 (9th Cir. 2001) and that there exists a conflict between state courts of last resort regarding the proper interpretation of public housing lease language required by 42 U.S.C. § 1437d(l)(6). Neither of these assertions is meritorious. Moreover, the decision from which review is sought is not a final disposition of the case on the merits and there are no extraordinary circumstances that would require the Court to grant certiorari at this stage of the proceedings.

I. THERE IS NO CONFLICT BETWEEN THE 9TH CIRCUIT'S DECISION IN *RUCKER* AND THE DECISION OF THE TENNESSEE SUPREME COURT REGARDING THE EVICTION OF PUBLIC HOUSING TENANTS FOR THE DRUG-RELATED CONDUCT OF GUESTS

In *Rucker*, tenants of the Oakland Housing Authority brought a federal lawsuit under the Administrative Procedures Act seeking injunctive and declaratory relief to prevent their eviction for the criminal acts of others. In affirming the trial court's issuance of a preliminary injunction to stop the housing authority from evicting tenants for off-premises drug-related activity, the *Rucker* court held:

> [I]f a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(l)(6) does not authorize the eviction of such a tenant.

Id. at 1135.

The statute referenced above is found in the Cranston-Gonzales National Affordable Housing Act of 1990. This legislation required all public housing agencies to include in their leases the following provision:

> any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest

> or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(l)(6). The scope of this statute was broadened further by a 1996 amendment which replaced the phrase "on or near such premises," with the phrase "on or off such premises." *See* Pub. L. 104-20 § 9(a); 42 U.S.C. § 1437d(l)(6).

In the instant case, Memphis Housing Authority brought an eviction action against Tara Thompson because of the drug-related arrest of a guest at her apartment. In reversing the trial court's award of summary judgment to the housing authority, the court in *Memphis Housing Authority v. Thompson* held:

> [N]either federal law nor the lease provisions impose a standard of strict liability for the drug-related criminal activities of Thompson's guests or other persons under her control. The phrase 'under the resident's control' permits eviction only if MHA establishes that Thompson knew or should have known of the drug-related criminal activity 'of a guest or other person' and failed to take reasonable steps to prevent or halt it.

MHA App. at 41a.

The holdings in *Thompson* and *Rucker* are remarkably similar in that both interpret lease language required by 42 U.S.C. § 1437d(l)(6) to permit eviction of a tenant for the illegal drug activity on the part of a guest or other under the tenant's control only if [s]he had knowledge of it or failed to take reasonable steps to prevent or stop it.

Clearly, there is no conflict between the *holdings* of the Tennessee Supreme Court and the Ninth Circuit

Court of Appeals; however, Memphis Housing Authority seizes onto dicta by the *Thompson* court to find conflict with the *Rucker* decision. In analyzing the lease provisions mandated by 42 U.S.C § 1437d(l)(6), the *Thompson* court observed that "both the language of the lease, and the federal statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug related criminal activity. . . . " MHA App. at 37a-38a. The *Rucker* court did not differentiate between household members and guests, as did the Tennessee Supreme Court.

It is a settled principle of Tennessee law that court decisions must be read with special reference to questions involved and necessary to be decided, and language used which is not decisive of the case is not binding as precedent. *See Rush v. Chattanooga Du Pont Employees' Credit Union,* 358 S.W.2d 333 (Tenn. 1962); *Bomar v. State ex rel. Boyd,* 312 S.W.2d 174, 178 (Tenn. 1958) (holding that "[o]biter dictum does not control the decision in a subsequent suit when the point which was obiter dictum is, in a subsequent case, presented for decision"); *Shepard Fleets, Inc. v. Opryland, U.S.A.,* 759 S.W.2d 914, 921-22 (Tenn. Ct. App. 1988); *Vinson v. Nashville, Chattanooga & St. Louis Ry.,* 321 S.W.2d 841, 845 (Tenn. Ct. App. 1958) (holding that "[i]t is a familiar principle that a case is authority for the point decided, and nothing more, and that general expressions in an opinion are to be limited to the case with which the court was dealing"). While the Tennessee court suggests that it would apply a different standard than that used in *Rucker* for evictions based upon the drug-related conduct of a household member, that suggestion is not binding precedent, and a rule of

law on the point would only come from a case involving an eviction based upon the acts of a household member. Moreover, there is some ambiguity in the *Thompson* court's statement on the point. In stating that the provisions of the lease language in question "clearly impose strict liability upon the resident *or household members* for engaging in drug-related criminal activity," it is unclear whether the court contemplated eviction of the entire household or only the guilty household member. MHA App. at 38a (emphasis added). Until the Tennessee court entertains a case involving eviction for the acts of a household member, it is speculative to presume that there would be a conflict with the decision in *Rucker.*

The holding in *Thompson* is consistent with that of *Rucker* and the language in the Court's opinion that differs from the holding in *Rucker* has no precedential effect. This case does not present a legitimate conflict between a state court of last resort and a United States Circuit Court of Appeals.

II. THIS CASE PRESENTS NO CONFLICT BETWEEN STATE COURTS OF LAST RESORT REGARDING THE EVICTION OF PUBLIC HOUSING TENANTS FOR THE DRUG-RELATED CONDUCT OF GUESTS

The petitioner relies on the decision of the Minnesota Supreme Court in *Minneapolis v. Lor,* 591 N.W.2d 700 (Minn. 1999) in support of its assertion that there is a conflict between state courts of last resort on an important federal question. This reliance is misplaced for two reasons.

The *Lor* case involved the eviction of a public housing tenant for the criminal activity of the tenant's son, who was a member of her household. The instant case involves the eviction of a public housing tenant for the drug-related criminal activity of a guest. Consequently, comparing the two cases is like comparing apples to oranges. This is especially true since the *Thompson* court has suggested, in dicta, that it would apply a different standard in a case involving a member of the tenant's household.

Moreover, in *Lor,* the issue before the Minnesota court was whether the trial court could properly consider equitable factors as a defense to eviction proceedings. Although related, this is a distinct issue from that raised in the *Thompson* case. The interpretation of lease language required by 42 U.S.C. § 1437d(l)(6) (which was the issue addressed in *Thompson* and *Rucker*) goes to the legal basis for eviction. The issue addressed by the *Lor* court was whether the trial court, or only the housing authority, had the discretion to consider whether to proceed with eviction when the grounds to evict existed.

Department of Housing and Urban Development regulations provide that a public housing authority has the discretion to consider all the circumstances of a case in deciding whether to evict for criminal conduct, including the seriousness of the offense, the extent of participation by family members, and the effect that the eviction would have on other family members who were not involved in the criminal activity. 24 C.F.R. § 966.4(1)(5)(vii)(B).

The discretion referenced here presupposes that there is a legal basis for eviction. Whether the housing authority should or should not proceed with an eviction because, for example, of the hardship it would cause on an innocent tenant is a different issue from whether a material violation of a lease provision has occurred. The trial judge in *Lor* apparently denied the eviction based upon unspecified equitable principles and did not address whether there had been a material breach of the lease. The basis of the Minnesota court's ruling was that the consideration of equitable factors was left to the discretion of the housing authority. This power was conferred by federal regulation. This rationale is distinguishable from the case at bar and undermines the assertion that a genuine conflict exists between the Tennessee and Minnesota courts of last resort.

The petitioner cites decisions from various other state appellate courts in support of its argument that there is a conflict between jurisdictions which this Court needs to resolve; however, none of the cited cases are from state courts of last resort as contemplated by Rule 10(b) of the Rules of the Supreme Court. Petition, pp. 14-15.

III. THE PETITION FOR WRIT OF CERTIORARI IS PREMATURE IN THAT THE DECISION OF THE TENNESSEE SUPREME COURT IS NOT A FINAL DISPOSITION OF THE CASE ON THE MERITS

The *Thompson* case was before the Tennessee Supreme Court upon appeal of the trial judge's issuance of summary judgment. The court reversed the decision of the Court of Appeals and remanded the case to the trial

court for reconsideration of the petitioner's motion for summary judgment. This court has repeatedly held that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Show Co. v. Wolf Brothers and Co.*, 240 U.S. 251, 258 (1916).

In denying certiorari from a ruling of the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967), this Court found that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court". *Id.* at 328. The *Thompson* case is in an identical posture and there are no extraordinary circumstances which would justify departure from the general rule that writs of certiorari are not granted until a final decree.

IV. PETITIONER'S CLAIM OF ERROR DOES NOT SUPPORT ISSUANCE OF A WRIT OF CERTIORARI

The petitioner devotes a great deal of its petition to quarreling with the merits of the *Thompson* decision; however, even if it were correct this would not constitute a compelling reason for this Court to accept review. While the respondent strongly disagrees with the petitioner's arguments regarding the proper interpretation of the lease language required by 42 U.S.C. § 1437d(l)(6), the correctness of the lower court's decision is of limited relevance in this Court's determination of the petition for certiorari. *See Watt v. Alaska*, 451 U.S. 259, 275 (1981) (J. Stevens, concurring) (holding that "this Court does not sit primarily to correct what we perceive to be mistakes

by other tribunals"); *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974) (holding that "this Court's review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review").

While it is tempting to engage in a debate of the merits of the *Thompson* decision with the petitioner, it would not assist this Court in its contemplation of whether there exists a compelling reason to accept review.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 00-1861

IN THE

Supreme Court of the United States

MEMPHIS HOUSING AUTHORITY,

Petitioner,

v.

TARA THOMPSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

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Petitioner Memphis Housing Authority ("MHA") respectfully submits this Reply to Respondent Tara Thompson's Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Memphis Housing Authority.

REASONS FOR GRANTING THE WRIT

I. A BASIS FOR CERTIORARI DOES EXIST.

A. Review Is Appropriate Because A Conflict Exists Between *Rucker* and State Courts Concerning the Meaning of 42 U.S.C. § 1437d(l)(6).

A principal purpose for which the Supreme Court uses its certiorari jurisdiction is to resolve conflicts among the United States Appellate Courts and the state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991), citing *Supreme Court Rule* 10.1.

The United States Court of Appeals for the Ninth Circuit in the case of *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) and the Supreme Court of Tennessee in *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504 (Tenn. 2001); App. at 1a. have both dealt with the question of whether, pursuant to 42 U.S.C. § 1437d(1)(6), a public housing authority ("PHA") has the authority to evict for drug-related criminal activity by tenants, household members, guests and/or other persons. The two courts arrived at conflicting interpretations of subsection (6).

The *Thompson* court in finding strict liability stated:

> After due consideration, we hold that the lease agreement imposes strict liability for drug-related criminal activity engaged in by the tenant or any household member but permits eviction for the drug-related criminal activity of "guests and other

> persons under [the tenant's] control" only if the tenant knew or should have known of the drug-related criminal activity and failed to take reasonable steps to halt or prevent the illegal activity.

Thompson, 38 S.W.3d at 505; App. at 3a.

The *Rucker* court held that knowledge of the drug-related criminal activity by the tenant was required to evict for conduct by household members outside the tenant's unit. *Rucker v. Davis*, 237 F.3d 1113, 1126 (9th Cir. 2001). The *Rucker* holding is in direct conflict with the holding in *Thompson* as it relates to household members.

Respondent asserts that *Thompson* did not issue a "holding" regarding household members. However, the language in *Thompson*, as can be seen from the above quote, speaks for itself and, "[t]his Court's appellate jurisdiction does not turn on such semantic niceties." *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 317, 105 S. Ct. 3180, 3187, 87 L. Ed. 2d 220 (1985).

In addition, *Rucker* affirmed the district court's grant of preliminary injunction and directives related thereto, including permission to pursue evictions when drug-related activity occurs within a tenant's apartment, thereby creating a rebuttable presumption that a tenant controls what occurs in his or her unit. *Id.* at 1127. The *Rucker* court explained, "these directives are perfectly consistent with our interpretation of control in § 1437d(l)(6)." *Id.* at 1127.

The Tennessee Supreme Court ruling in *Thompson* clearly reflects that the court was not creating such a rebuttable presumption and, indeed, expressly held otherwise. The court explained:

> The phrase "under the resident's control" permits eviction only if MHA establishes that Thompson

> knew or should have known of the drug-related criminal activity "of a guest or other person" and failed to take reasonable steps to prevent or halt it.

Thompson at 512-513; App. at 41a.

Hence, contrary to respondent's, argument, the holding in *Thompson* is not "in fact entirely consistent with *Rucker*," even with regard to drug-related conduct by guests within a tenant's unit.

B. Review Is Appropriate Because A Conflict Exists Between *Thompson* and State Courts Concerning the Meaning of 42 U.S.C. § 1437, *et seq.*

Respondent's reading of *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999), is not sound. One of the primary tasks before the *Lor* court was to, "determine PHA eviction powers." *Id.* at 702. The *Lor* court decided the matter by interpreting the United States Housing Act and related HUD regulations, as did the courts in *Rucker* and *Thompson*. *Id.* at 702-703. The *Lor* court held that the housing authority had the discretion to evict a tenant because of her son's criminal activities. *Id.* While the tenant was out of town, the son, who was a household member, was involved in a drive by shooting. *Id.* The next day, the police found illegal guns at the apartment. *Id.* at 702. In deciding the issue, the *Lor* court assumed that the tenant, "did not have any knowledge of her son's activity or reasons to anticipate her son's acts." *Id.* The *Lor* court upheld the eviction because the household member was involved in the criminal activity, the activity was a breach of the lease, and the tenant's knowledge was not required. *Id.*

A clear conflict exists between *Lor* and *Thompson* on the question of whether a tenant's knowledge of criminal activity engaged in by a household member or guest is required prior to the eviction proceedings.

C. The Question Presented Is Ripe for Review.

There is no bar to this Court's review of nonfinal judgments of the lower federal courts and, if necessary, reversing a court of appeal's judgment in summary disposition fashion. *See Mazurek v. Armstrong*, 520 U.S. 968, 975, 117 S. Ct. 1865, 1868, 138 L. Ed. 2d 162 (1997); *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 317, 105 S. Ct. 3180, 3187, 87 L. Ed. 2d 220 (1985). The Respondent seeks to support its position by relying on the holding in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967). That holding is inapplicable. The *Bangor* case involved the scope of an arbitration award issued in a union dispute. This Court denied certiorari in *Bangor* because the Court of Appeals had remanded the matter for further findings prior to rendering a decision regarding the issue of whether a restraining order had been violated. *Id.* 389 U.S. at 327-328, 88 S. Ct. at 438. Contrary to *Bangor*, the Tennessee Supreme Court has rendered a decision with regard to the federal issue in the *Thompson* case and remanded the case to the trial court for adjudication in conformity with the standard adopted in the court's ruling. Therefore, the Tennessee Supreme Court, by way of its interpretation of § 1437d(1)(6) set the legal standard to be used in the instant case and every PHA "criminal activity" eviction proceeding case to follow in the State of Tennessee.

Although 28 U.S.C. § 1257 requires that the Supreme Court review final judgments from the highest court of a state, this Court in its discretion, may make a determination as to what constitutes a final decision under the § 1257 requirement. In *Forgay v. Conrad*, 147 U.S. 201, 6 How. 201, 12 L. Ed. 404 (1848), the Court noted the following regarding final decisions:

> The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict,

> technical sense of that term. But this court has not heretofore understood the words "final decree" in this strict and technical sense, but has given to them a more liberal, and as we think, a more reasonable construction, and one more consonant to the intention of the legislature.

Id. at 203.

The Petitioner avers that, notwithstanding the fact that this case has been remanded to the trial court for further adjudication, a final decision has been made with regard to the federal issue which effectively established a standard and a precedent that lower courts of Tennessee will be forced to follow. For this reason, the decision of the Tennessee Supreme Court should, for purposes of appellate review by this Court, be considered final.

It is well established that a judgment may be considered final even when additional proceedings are required on remand to lower state courts, if the higher court's decision effectively determines the litigation. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973) in which this Court granted certiorari after the case was remanded by the state supreme court for an administrative hearing.

In *North Dakota State Board of Pharmacy*, the Court, in determining that the finality requirement of 28 U.S.C. § 1257 was met, stated, "this concept of finality has a penumbral area." *Id.* at 410 (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945)). This position was also taken in *Mills v. Alabama*, 384 U.S. 214 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) involving a proceeding in which the state supreme court upheld the constitutionality of a state statue and remanded the case to the trial court. This Court deemed the judgment

to be final despite the fact that the case had been remanded to the trial court for adjudication.

Perhaps the most instructive decision on the issue of finality is this Court's ruling in the case of *Cox Broadcasting Corporation et al. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). In an opinion delivered by Mr. Justice White, this Court recognized that under certain circumstances, a departure from the finality requirement was warranted and federal appellate jurisdiction would be proper under 28 U.S.C. § 1257, even when further state court proceedings were required due to a remand by a higher court. The Court noted further that these situations were not particularly rare and that at least four categories of such cases existed in which the Court had, "treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and taken jurisdiction without awaiting the completion of the additional proceedings anticipated by the lower state courts." *Id.* at 477.

The first two categories noted by the Court consist of cases in which the federal question would not be mooted by the future proceedings for various reasons, i.e., "the proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* The other two categories consist of cases in which the federal issue would be mooted if, "the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." *Id.* at 478 and 479.

The Petitioner submits that this matter is within the above categories and therefore, this case represents a matter which would warrant a more pragmatic approach to the issue of finality and would also warrant a departure from the standard finality requirement.

D. The Thompson Decision Has Immediate Consequences On Other Tennessee PHAs and Other Tenants.

It is respectfully submitted that the *Thompson* ruling will have an immediate adverse effect for MHA and PHAs in their ability to provide safe and affordable housing to tenants. An immediate and adverse consequence of the *Thompson* ruling is that there will be an impaired ability of MHA and other PHAs to take advantage of a Congressionally granted weapon against illegal drug trafficking and its attendant violence. It is respectfully submitted that the *Thompson* ruling in effect amends the federal legislation by imposing conditions on the use of the drug eviction powers that Congress expressly declined to impose. The ultimate effect is that tenants now have less protection. This reason supports certiorari. *See Mazurek*, *supra*, at 975, 1868.

II. THE PETITIONER'S CLAIM OF ERROR DOES SUPPORT AN ISSUANCE OF A WRIT OF CERTIORARI.

Respondent' s argument that an erroneous interpretation of the law is not a basis for review in this case lacks merit. In the two cases cited by respondent in support of their position, this Court granted certiorari. *See Ross v. Moffitt*, 417 U.S. 600, 604, 94 S. Ct. 2437, 2441, 41 L. Ed. 2d 341 (1974) and *Watt v. Alaska*, 451 U.S. 259, 264, 101 S. Ct. 1673, 1677, 68 L. Ed. 2d 80 (1981).

In the concurring opinion cited by respondent in *Watt*, *supra*, Justice Stevens joined in the majority opinion on the merits. *Watt* at 451 U.S. at 276, 101 S. Ct. 1683. However, he wrote a concurring opinion to voice his disagreement to the extent certiorari was granted to review the court of appeals' interpretation of the federal Wildlife Refuge Revenue Sharing Act of 1935. He did so because in his

opinion, the lower courts interpretation, "did not conflict with any other judicial decision and there is no reason to anticipate that a comparable issue will arise in another Circuit in the foreseeable future." *Id.*, 451 U.S. at 274, 101 S. Ct. at 1682. Petitioner submits that the interpretation of 42 U.S.C. § 1437d(1)(6) rendered by the Tennessee Supreme Court conflicts with interpretations of the same law by other state courts and federal appellate courts. Additionally, it is undisputed that the issue will arise in the near future in other federal and state courts. Hence, *Watt* supports certiorari in this case.

The issue in *Ross*, a criminal case, was whether an indigent defendant was entitled to appointment of counsel on his petitions for review by the State Supreme Court and this Court. *See Ross* at 417 U.S. 602-603, 94 S. Ct. at 2440. The Court held he was not entitled to such an appointment, but explained that even without such an appointment, he was not denied fair access to either court in light of the record below and the courts' discretionary review. *Id.* at 417 U.S. at 615-617, 94 S. Ct. at 2446-2447.

The law as interpreted by the Tennessee Supreme Court and the legal standard established by the court clearly conflicts with other State and federal appellate courts. Contrary to respondent' s position, the Court has discretion to grant review here.

III. THIS COURT SHOULD NOT DELAY ITS REVIEW OF THIS MATTER BUT SHOULD DIRECT THE FEDERAL AND STATE COURTS ON THE PROPER STANDARD OF THE FEDERAL LAW TO AVOID FUTURE CONFLICTS.

The Supreme Court Rules provide for review of conflicts within the federal courts, conflicts among the United States Courts of Appeals and the state courts as to proper interpretations of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991); Supreme Court Rules 10(a) and (c).

This Court is not required to delay acting and wait until federal and state courts reach uniformity or additional conflicts arise in the interpretation of section 1437d(l)(6). Such a delay in this case is unwarranted and has the potential to cause irreparable harm to the tenants of this Nation's many Housing Authorities.

CONCLUSION

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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